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MANUAL OF NAVAL LAW.

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MANUAL OF

NAVAL LAW

AND

COURT MARTIAL PROCEDURE

IN WHICH IS EMBODIED

THRING'S CRIMINAL LAW OF THE NAVY.

TOGETHER WITH

THE NAVAL DISCIPLINE ACT

AND AN APPENDIX OF

PRACTICAL FORMS.

FOURTH EDITION

BY

J. E. R. STEPHENS,

OF THE MIDDLE TEMPLE AND MIDLAND CIRCUIT, BARRISTER-AT-LAW;

C. E. GIFFORD, C.B.,

PAYMASTER-IN-CHIEF, R.N.;

AND

F. HARRISON SMITH, C.B.,

PAYMASTER-IN-CHIEF, R.N.

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PREFACE

TO THE FOURTH EDITION.

A GENERAL recasting of the Admiralty Memorandum on Court-martial Procedure in 1907, and the incorporation therein of the amendments necessitated by the introduction of the Detention system of punishment in 1910, having rendered desirable a new edition of this work, and the third edition having been exhausted, the opportunity has been taken to thoroughly revise the book. The three revisers who collaborated in the third edition have done so again, and on the lines set forth in the preface to that edition.

The work commences with an introductory historical sketch compiled by the late Mr. Theodore Thring, Barrister-at-law. He drew chiefly on Sir W. Monson's naval tracts for his cotemporary account of the state of the Navy [1] in the latter half of the sixteenth and beginning of the seventeenth centuries. Admiral Sir William Monson was born in 1569; went to sea in 1585; and was in active service, with some intervals, until 1635. He composed his work about 1640, and died in 1642. His public services at sea and on shore therefore extended over a period of more than fifty years, and his writings are remarkable for devotion to his profession, honesty of purpose, and general knowledge of naval affairs.

Mr. Thring threw new and important light on the origin of Articles of War, and the proceedings of Naval Courts-martial, from information derived from a collection of unpublished documents at the Admiralty. It

[1] Maladministration at the Admiralty appears to have been a grievance in the time of Sir W. Monson, for he has a chapter on the "Corrupt Abuses used in his Majesty's service by Sea, and the means how to Reform them"; and he dwells most forcibly on the necessity of reform "because our bordering neighbours, the French and Hollanders, daily increase in shipping as we daily see by proof."

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appears from these, and from the entries in the Journals of Parliament, that the first ordinance, or statute, for the government of the navy, originated with the Long Parliament, and that a very complete system for trial by councils of war was organised in pursuance of that law by the admirals and generals of the fleet in the service of the Commonwealth. No copy of this ordinance can be found, either in the public libraries or the record departments of the Government. Previous to Mr. Thring's work in 1861 no attempt had been made to collect a complete set of the ordinances of the Interregnum which now appear in his historical chapter.

Mr. Stephens has rendered the chapter on Offences Punishable by Ordinary Law, and the Table of those Offences, very much more complete, and has dealt in greater detail with the Rules of Evidence. As both these subjects present greater difficulties to the naval officer than the others which come more commonly into the practice of the naval profession, his co-revisers feel sure that their brother-officers will derive much assistance from the result of Mr. Stephens' efforts. He has also inserted the year in which each case was decided.

The List of References, with their abbreviations, constitutes a complete index of the authorities consulted and drawn upon in the compilation of this work. The Table of Cases Cited, drawn up by Mr. Stephens, is a new feature which it is hoped will be found useful.

Some portions of the Admiralty Memorandum on Court-martial Procedure, which would be of use only to naval officers, who have the Memorandum, have been omitted from the Appendix with a view to reducing the bulk of this book; but others, such as the actual procedure, which would be of use to civilians or others who might act as "Friend of the Accused," and who would not have the Memorandum, or might prefer to use only one book, have been retained.

31 *October*, 1911.

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PREFACE

TO THE THIRD EDITION.

THE passing of the Naval Discipline Act of 1884, and the many changes in the legal or judicial customs of the Royal Navy which have taken place since the second edition of "Thring's Criminal Law of the Navy" was published in 1877, have rendered necessary a new Manual for the guidance of naval officers.

The plan of that edition has been substantially adhered to, many of its characteristic and more permanent features, such as the interesting historical chapter on "The Early State and Discipline of the Navy," being left almost untouched. But in such progressive matters as the Methods and Forms of Procedure complete revision has been carried out.

The revision of chapters relating to matters of ordinary law, notably XI., XIV., and XV., is the work of Mr. J. E. R. Stephens, Barrister-at-Law, who has largely extended Chapter XV. on the Rules of Evidence. The revision of chapters relating to naval law and customs is the work of Fleet Paymaster Charles E. Gifford, R.N., co-author with Mr. Thring in the second edition of his work, and Staff Paymaster F. Harrison Smith, R.N., who is also the compiler of the new chapter XVI. Other chapters such as III., IX., X., XII., are the joint work of the revisers, while the chapters specially undertaken by

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any one of them have received the scrutiny and concurrence of the others.

For facilities of research amongst the Admiralty Records, by which the publication of the present work has been greatly assisted, the thanks of the revisers are tendered to Mr. H. J. Vansittart Neale, C.B., and other members of the Legal Branch at the Admiralty. The revisers also desire to acknowledge their indebtedness to Her Majesty's Stationary Office for permission accorded to make extracts from the "Manual of Military Law"; in compliance with the terms of that permission the origin of such extracts is distinguished in each case.

15 *January*, 1901.

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Adm. Inst. ...	... The Admiralty Instructions. Ed. 1906.
Adm. Rec.	... Admiralty Records.
A. L.	... Admiralty Letter.
A. O.	... Admiralty Order.
A. S.	... Admiralty Statutes. Ed. 1905.
Abr. (Vin.) ...	... Viner's Abridgment.
Ad. & E.	... Adolphus & Ellis' Reports. King's Bench Division.
Adye	... Adye on Courts-Martial.
Archæologia ...	... Miscellaneous Tracts, published by Society of Antiquaries.
Arch. Cr. Law ...	... Archbold's Pleading and Evidence in Criminal Cases.
B.	... Baron, *i.e.*, Judge of old Court of Exchequer.
B. & Ad.	... Barnewall & Adolphus' Reports. King's Bench Division.
B. & B.	... Broderip & Bingham's Reports. Court of Common Pleas.
B. & C.	... Barnewall & Cresswell's Reports. King's Bench Division.
B. R.	... Bancum Regis (King's Bench).
Barn. & Ald. ...	... Barnewall & Alderson's Reports. King's Bench Division.
Best. Law of Ev. ...	... Best's Law of Evidence.
Bl. (N. S.)	... Bligh's Reports (New Series). House of Lords.
Bl. Com. (or Rep.)	... Blackstone's Commentaries (or Reports).
Bl. H.	... H. Blackstone's Reports. Court of Common Pleas.
Bl. Steph.	... Stephen's Edition of Blackstone's Commentaries.
Bl. W.	... W. Blackstone's Reports. King's Bench Division.
Bos. & P. N. R. ...	... Bosanquet & Puller's New Reports. Court of Common Pleas, 1804—7
Bro. Parl. Ca. ...	... Brown's Cases in Parliament.
Burn's Just. ...	... Burn's Justices' Manual.
Burr.	... Burrow's Reports. King's Bench Division.
Byng's M. S. ...	... Admiral Byng's Manuscript from the Admiralty Records.
C. & K.	... Carrington & Kirwan's Reports. *Nisi Prius.*
C. & Mar.	... Carrington & Marshman's Reports. *Nisi Prius.*
C. & P.	... Carrington & Payne's Reports. *Nisi Prius.*
C. & R.	... Cockburn & Rowe's Reports.

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C. B. (N. S.) ...	... Common Bench Reports, Court of Common Pleas (New Series).
C. C.	... Cases in Chancery or Crown Cases.
C. C. R.	... Crown Cases Reserved.
C. J.	... Chief Justice.
C. M.	... Court-Martial.
C. M. M. or Memo.	... Admiralty Memorandum on Court-Martial Procedure. 1910.
Camph. Adm. ...	... John Campbell's Lives of British Admirals, 4 vols., 1742.
Car.	... Charles.
Church	... Churchill's Collection of Voyages. 1732.
Cl. & Fin.	... Clark & Finelly's Reports. House of Lords, 1831—46.
Clar.	... Clarendon's History of Rebellion.
Com.	... Comyn's Reports. King's Bench Division.
Coke, Inst. ...	... Coke's Institutes of the Laws of England, 4 vols., 1837.
Coke, Rep.	... Coke's Reports. King's Bench Division.
Cox, Cr. Ca. ...	... Cox's Criminal Cases.
D'Aquilar on C. M.	... D'Aquilar on Courts-Martial.
Dears.	... Dearsley's Crown Cases.
Den.	... Denison's Crown Cases. 1844—52.
Dickson, Ev. Sc. ...	... Dickson's Law of Evidence in Scotland.
Dodson's Adm. Rep.	... Dodson's Reports. Admiralty Division.
Dysart, Peer. H. L.	... The Dysart Peerage Cases in the House of Lords.
East, Rep.	... East's Reports. King's Bench.
East, P. C.	... East's Pleas of the Crown.
Edward's, Adm. Rep.	... Edward's Reports. Admiralty Division. 1808—12.
Encycl. Brit. ...	... Encyclopædia Britannica.
Esp.	... Espinasse's Reports. *Nisi Prius.* 1793—1807.
Exch.	... Exchequer.
F. & F.	... Foster & Finlason's Reports. *Nisi Prius.* 1856—67.
Finlason	... Finlason's Authorised Reports.
Fost.	... Foster's Crown Cases.
H. Bl.	... H. Blackstone's Reports. Court of Common Pleas.
H. L.	... House of Lords.
Hagg.	... Haggard's Reports. Admiralty Division. 1822—38.
Hakluyt	... Richard Hakluyt, eminent Naval Historian. 1616.
Hale, P. C. ...	... Hale's Pleas of the Crown.
Hallam, Const. Hist.	... Hallam's Constitutional History of England.
Harwood, U. S. C. M.	... Harwood's Courts-Martial; United States of America.
Hawk. (P. C.) ...	... Hawkins' Pleas of the Crown.
Holin. Chron. ...	... Holinshead's Chronicles.
Holt, N. P. Rep. ...	... Holt's Reports. *Nisi Prius.* 1815—17.
Howe, St. Tr. ...	... Howe's State Trials.
Hughes	... Hughes on the Duties of Judge-Advocates.
Hume	... Hume's History of England.
J. JJ.	... Justice. Justices.
James's Nav. Hist....	... James's Naval History.

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Journ.—Lords—Comm. ...	Journal of the House — of Lords — or Commons.
Just.	Reports of the Court of Justiciary. (Scotch.)
Kent's Comm. ...	Kent's Commentaries on American Law.
L. & C.	Leigh & Cave's Reports.
L. J.	Law Journal.
L. J. Ch.	Law Journal. Chancery Division.
L. J. C. P.	Law Journal. Common Pleas.
L. J. M. C.	Law Journal. Magistrates' Cases.
L. J. P. C.	Law Journal. Privy Council Appeals.
L. R.	Law Reports.
L. R. C. C. R. ...	Law Reports. Crown Cases Reserved.
L. R. P. C.	Law Reports. Privy Council Appeals.
L. R. Q. B.	Law Reports. Queen's Bench Division since 1890.
Leach	Leach's Crown Cases. 1730—1815.
Lew.	Lewin's Crown Cases.
Lords' Journal ...	Journal of the House of Lords.
Lord Mahon (Hist. Eng.)	Lord Mahon's History of England.
M. & R.	Moody & Robinson's *Nisi Prius* Cases.
M. & S.	Maule & Selwyn's Reports. King's Bench Division, 1813—17.
M. M. L.	Manual of Military Law. Ed. 1907.
Macaulay	Macaulay's History of England.
McArthur	McArthur on Courts-Martial.
Moo. C. C.	Moody's Crown Cases, 1824—44.
Mons. Nav. Tract....	Admiral Sir William Monson's Naval Tracts, 1640.
N. D. A. or Act ...	Naval Discipline Act, 1866, modified by Act of 1884.
New Rep.	New Reports, by Bosanquet & Puller, or of 1862—5.
O. M.	Owen's Manual for Overseers.
P. & O. S. N. Co. ...	Peninsular and Oriental Steam Navigation Company.
Parl. Hist.	Cobbett's Parliamentary History.
Peake.	Peake's *Nisi Prius* Cases.
Phill. Ev.	Phillips & Arnold on "Evidence."
Phillips	Phillips' Reports. Chancery Division, 1841—9.
Powell on Ev. ...	Powell on Evidence.
Prendergast ...	"Law Relating to Officers of the Navy."
Q. B. (D.) (R.) ...	Queen's Bench (Division) (Reports.)
R.	Rex or Regina.
R. & M.	Russell & Mylne's Reports. Chancery Division. 1829—31.
R. & R.	Russell & Ryan's Crown Cases, 1799—1824.
Rob.	Robinson's Reports. Admiralty Division.
Rog. de Wend. ...	Roger of Wendover. Chronicles.
Roscoe's Crim. Ev.	Roscoe's Evidence in Criminal Cases.
Rushworth ...	John Rushworth, 1690. Historical Works.
Russ.	Russell's Reports. Chancery Division, 1826—9.
Russ. Cri.	Russell on "Crimes." 7th Ed.
St. Tr.	Howell's State Trials.
Seld. Mar. Clau. ...	Selden's Mare clausum, seu de Dominio Maris, libri 2. 1635.

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Simmons	... Capt. T. F.—"The Constitution and Practice of Courts-Martial."
Smith's Lead. Ca. ...	... Smith's Leading Cases.
Starkie, Ev. ...	... Starkie on Evidence.
Steph. Commentaries	... Stephen's Commentaries on the Laws of England.
Stephen, Bl. ...	... Stephen's Edition of Blackstone's Commentaries.
Stephen, Ev. ...	... Stephen's Digest of the Law of Evidence.
Steph. Dig. of Cr. Law.	... Stephen's Digest of the Criminal law.
Stephen's General View of	Crim. L. (Criminal Law).
Story's	... Conflict of Law.
Stowe's Chron. ...	... Stowe's Chronicles.
T. R.	... Term Reports (Durnford & East), 4 vols. 1794—1809.
Tait Ev.	... Tait on Evidence.
Taunt.	... Taunton's Reports. Court of Common Pleas, 1807—19.
Taylor, Ev. ...	... Taylor on Evidence. 11th Ed.
Toml. Law Dict.	... Tomlinson's Law Dictionary.
Tytler's	... Essay on Courts-Martial.
U. S. C. M.... ...	... Harwood on the Courts-Martial of the United States.
Vin. Abr.	... Viner's Abridgment.
Val. Comm. ...	... Valin's Commentaires sur l'Ordonnances. 1681.
Ves....	... Vesey Senior's Chancery Reports or Vesey Junior. Vols 3—19.
Ves. Jun.	... Vesey Junior's Reports.
W. Bl.	... W. Blackstone's Reports. King's Bench Division.
Wills	... Wills on the Law of Evidence.
Wils.	... Wilson's Reports.

NOTE.—Arabic figures (1) preceding, or Roman figures (i.) succeeding the name of the work quoted denote the volume. Arabic figures following the name denote the page. Dates are those of the edition quoted.

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INSTRUCTIONS

FOR ALL COMMANDERS-IN-CHIEF OF SQUADRONS, FOR ALL FLAG COMMANDERS IN THEIR DIVISIONS, AND FOR ALL CAPTAINS OF SHIPS AT SEA IN THE SERVICE OF THE COMMONWEALTH:

By ROBERT BLAKE, GEORGE MONCK, JOHN DISBROW, *and* WILLIAM PENN, *Admirals and Generals of the Fleet, set forth by Authority of Parliament of the Commonwealth of England and for Defence of the same.*

WHEREAS there are and may be from time to time sundry exorbitances and miscarriages amongst several persons in the fleet, for restraining whereof General Councils of War cannot be so frequently called as were requisite: For preventing, therefore, of the same, and for regulating and governing the fleet in better order for the future, according to the Laws of War and Ordinances of the Sea ordained and established by Parliament of the Commonwealth of England, we have thought expedient and do hereby order as followeth:—

That the First Article of the said laws and ordinances be duly observed by each commander of and in the fleet, according to the true intent and tenor thereof.

That the chief flag (or commander) of each squadron with the assistance of the council of war of the squadron under his command, do fully determine, sentence, and punish all offences committed against any and every of the Articles of the Laws of War and Ordinances of the Sea, by any person belonging to any of the ships in his respective squadron, provided that no execution or

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sentence of loss of life or limb do proceed (if the fact shall so deserve), until that we, the generals, be made acquainted with the crime (the criminal being still secured), as also with the depositions against and defences made by the offender, with all circumstances thereon depending, and the same delivered to the judge advocate of the fleet, to be enregistered and kept upon record: Provided also, that no sentence for the cashiering of a captain of any vessel of war, of the States, or in their service, do pass until that we, the generals, have had information of the whole, and that the proceedings be delivered as above said to be recorded.

That each commander bearing flag subordinate to the chief commander of any squadron calling to council with him the commanders of the ships of his division, that shall be present, to the number of three at least, have hereby power to determine, sentence, and punish all offences against any and every of the said Laws and Ordinances of the Sea, that are or shall be committed within the ship (or any ships of the division) under his command, provided that no sentence of loss of life or limb do pass upon any person, or of cashiering any captain, until we, the generals, be made acquainted with all the circumstances of the proceeding. And likewise provided, that no sentence of cashiering any lieutenant, or master of any ship-of-war, of the States, or in their service shall pass, until the chief flag or commander of that whole squadron be informed, as aforesaid: And that the informations and depositions be remitted to record, as in the former section expressed. And it is hereby likewise ordered, that whensoever any vessels consisting of three ships-of-war or more, shall be sent or commanded towards any guard or station, the commander of that party shall have, and hereby hath the same power to punish any manner of crime or person, that is hereby

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given unto the flag commander of a division during the time of their stay abroad.

It is further ordered, that the captain of each particular ship-of-war of the States, or in their service, calling unto his assistance the lieutenant of the said ship (if any be thereupon allowed), with the master, his mates, clerk of the cheque, gunner, boatswain, and carpenter thereof, have hereby power to examine, bring to trial and punishment, any person belonging to the ship whereof he is commander, for any and every offence committed against any of the said Laws and Ordinances of the Sea, or against such other orders as have been formerly, or shall be made by us, for retaining of mariners within board of their respective ships, for the containing of them within their duties, whilst on board, and for the punishment of any who shall attempt to carry them thence without leave first obtained. And this order is further to extend to the punishing in like manner of any offence committed on shore, in any place or harbour (into which any of the ships that are, or shall be, in the service of the state, shall be sent, or may have occasion to put in), by any person of or belonging to any such ship or vessel, as also of any offence committed against orders already made, or hereafter to be made by us, for the prevention of fire or any other accidental mischances by miscarriage of light, taking tobacco, selling strong water or strong drink within board, or the breach of future orders, for the avoiding of mischiefs, and inconveniences in the fleet, provided that no sentence of loss of life or limb do pass, nor the cashiering of any officer, having a commission or warrant for his place, but that all such officers be remitted unto the commander of the party (if remote from the fleet), or to the flag commander of the division, or to the next superior commander in the squadron, or (if he also be absent) to the chief flag or commander thereof, according to the power by us devolved unto every

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of them in the preceding sections: And that each person within their cognizance respectively may receive sentence, and undergo execution thereof condign to his demerit, reserving the case of loss of life or limb, or cashiering of captains to our own immediate knowledge.

And it is lastly ordered, that according to a former order of the 16th of May, 1653, all commanders of ships of war in the service of the state do, without delay, repair on board the flag of the division under which they are ranged, or the chief flag of the squadron, at all such times as a pendant or other signal for a council of war shall be put forth by any of the said flags, upon penalty of the forfeiture of one whole day's pay for the first neglect, and the like for the second, unless cause allowable be shown to the contrary (in which case they are to send the officer nearest them in place or command to excuse their absence), and upon refusal of payment, to be taken into custody by the marshal-general of the fleet, until the same be made. And the same person offending a third time, to be presented and proceeded against at the next general council of war, as a contemner of order and discipline.

Given under our hands and seal of Anchor, on board the "Swiftsure," the 16th day of December, 1653.

Signed { GEORGE MONCK.
{ WILLIAM PENN.

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NAVAL DISCIPLINE ACT, 1866,

(29 & 30 Vict. c. 109)

AS AMENDED BY THE ACT OF 1884 (47 & 48 Vict. c. 39), AND THE ACT OF 1909 (9 Edw. 7, c. 41).

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* * * * *

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An Act to make Provision for the Discipline of the Navy. [10*th August*, 1866.]

[*Printed, as amended, in accordance with the Naval Discipline Act*, 1884 (47 & 48 *Vict. c.* 39), *and the Naval Discipline Act*, 1909 (9 *Edw.* 7, *c.* 41).]

WHEREAS it is expedient to amend the law relating to the government of the Navy, whereon, under the good Providence of God, the wealth, safety, and strength of the kingdom chiefly depend:

Be it enacted by the Queen's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:

PART I.

ARTICLES OF WAR.

Public Worship.

Public worship to be performed.

1. All officers in command of Her Majesty's ships of war shall cause the public worship of Almighty God according to the liturgy of the Church of England established by law to be solemnly, orderly, and reverently

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performed in their respective ships, and shall take care that prayers and preaching, by the chaplains in Holy Orders of the respective ships, be performed diligently, and that the Lord's Day be observed according to law.

Misconduct in the Presence of the Enemy.

Penalty for misconduct in action.

2. Every flag officer, captain, commander or officer commanding subject to this Act who upon signal of battle, or on sight of a ship of an enemy which it may be his duty to engage shall not,

(1.) Use his utmost exertion to bring his ship into action;

(2.) Or shall not during such action, in his own person and according to his rank, encourage his inferior officers and men to fight courageously;

(3.) Or who shall surrender his ship to the enemy when capable of making a successful defence, or who in time of action shall improperly withdraw from the fight,

shall, if he has acted traitorously, suffer death; if he has acted from cowardice shall suffer death, or such other punishment as is herein-after mentioned; and if he has acted from negligence, or through other default, he shall be dismissed from Her Majesty's service with or without disgrace, or shall suffer such other punishment as is herein-after mentioned.

Penalty for not pursuing the enemy, and of not assisting a friend in view.

3. Every officer subject to this Act who shall forbear to pursue the chase of any enemy, pirate, or rebel, beaten or flying, or shall not relieve and assist a known friend in view to the utmost of his power, or who shall improperly forsake his station, shall, if he has therein acted traitorously, suffer death; if he has acted from cowardice, suffer death or such other punishment as is herein-after mentioned; if he has acted from negligence, or through other default, shall be dismissed from Her

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Majesty's service, with disgrace, or shall suffer such other punishment as is herein-after mentioned.

Penalty for delaying or discouraging the service, or deserting his post, &c.

4. When any action or any service is commanded, every person subject to this Act who shall presume to delay or discourage the said action or service upon any pretence whatsoever, or in the presence or vicinity of the enemy shall desert his post or sleep upon his watch, shall suffer death or such other punishment as is herein-after mentioned.

Penalty for misconduct of subordinate officers and men in action.

5. Every person subject to this Act, and not being a commanding officer, who shall not use his utmost exertions to carry the orders of his superior officers into execution when ordered to prepare for action, or during the action, shall, if he has acted traitorously, suffer death; if he has acted from cowardice shall suffer death, or such other punishment as is herein-after mentioned; and if he has acted from negligence, or through other default, be dismissed from Her Majesty's service, with disgrace, or suffer such other punishment as is herein-after mentioned.

Communications with the Enemy.

Penalty for spies.

6. All spies for the enemy shall be deemed to be persons subject to this Act, and shall suffer death or such other punishment as is herein-after mentioned.

Penalty for corresponding, &c., with the enemy.

7. Every person subject to this Act who shall—

(1.) Traitorously hold correspondence with or shall give intelligence to the enemy;

(2.) Or fail to make known to the proper authorities any information he may have received from the enemy;

(3.) Or who shall relieve the enemy with any supplies,

shall suffer death, or such other punishment as is herein-after mentioned.

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Penalty for improper communication with the enemy.

8. Every person subject to this Act who shall, without any treacherous intention, hold any improper communication with the enemy, shall be dismissed with disgrace from Her Majesty's service, or shall suffer such other punishment as is herein-after mentioned.

Neglect of Duty.

Penalty for abandoning post, &c.

9. Every person subject to this Act who shall desert his post or sleep upon his watch, or negligently perform the duty imposed on him, shall be dismissed from Her Majesty's service, with disgrace, or shall suffer such other punishment as is herein-after mentioned.

Mutiny.

Penalty for mutiny accompanied by acts of violence.

10. Where mutiny is accompanied by violence, every person subject to this Act who shall join therein shall suffer death, or such other punishment as is herein-after mentioned; and every person subject to this Act who shall not use his utmost exertions to suppress such mutiny shall, if he has acted traitorously, suffer death, or such other punishment as is herein-after mentioned; if he has acted from cowardice, shall suffer penal servitude or such other punishment as is herein-after mentioned; if he has acted from negligence he shall be dismissed from Her Majesty's service, with disgrace, or suffer such other punishment as is herein-after mentioned.

Penalty for mutiny not accompanied by acts of violence.

11. Where a mutiny is not accompanied by violence, the ringleader or ringleaders of such mutiny shall suffer death, or such other punishment as is herein-after mentioned; and all other persons who shall join in such mutiny, or shall not use their utmost exertions to suppress the same, shall suffer imprisonment or such other punishment as is herein-after mentioned.

Penalty for inciting to mutiny.

12. Every person subject to this Act who shall endeavour to seduce any other person subject to this Act from his duty or allegiance to Her Majesty, or

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endeavour to incite him to commit any act of mutiny, shall suffer death or such other punishment as is herein-after mentioned.

Penalty for civilians endeavouring to seduce from allegiance.

13. Every person, not otherwise subject to this Act, who, being on board any ship of Her Majesty, shall endeavour to seduce from his duty or allegiance to Her Majesty any person subject to this Act, shall so far as respects such offence be deemed to be a person subject to this Act, and shall suffer death or such other punishment as is herein-after mentioned.

Penalty for making mutinous assemblies or uttering seditious words.

14. Every person subject to this Act who shall make or endeavour to make any mutinous assembly, or shall lead or incite any other person to join in any mutinous assembly, or shall utter any words of sedition or mutiny, shall suffer penal servitude or such other punishment as is herein-after mentioned.

Penalty for concealing any traitorous or mutinous practice, design, or words.

15. Every person subject to this Act who shall wilfully conceal any traitorous or mutinous practice or design, or any traitorous or mutinous words spoken against Her Majesty, or any words, practice, or design tending to the hindrance of the service, shall suffer penal servitude or such other punishment as is herein-after mentioned.

Punishment for striking or attempting to strike, &c., superior officer.

16. Every person subject to this Act who shall strike, or with any weapon attempt to strike, or draw or lift up any weapon against his superior officer being in the execution of his office, shall be punished with death or such other punishment as is herein-after mentioned; and every person subject to this Act who shall, otherwise than with a weapon, attempt to strike or use or attempt to use any violence against his superior officer being in the execution of his office, shall be punished with penal servitude or such other punishment as is herein-after mentioned; and every person subject to this Act who shall strike or attempt to strike, or draw or lift up any weapon against, or use or attempt to use any violence

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against his superior officer not being in the execution of his office, shall be punished with penal servitude or such other punishment as is herein-after mentioned.

Insubordination.

Penalty for disobedience or using threatening language to superior officer.

17. Every person subject to this Act who shall wilfully disobey any lawful command of his superior officer, or shall use threatening or insulting language, or behave with contempt to his superior officer, shall be punished with dismissal with disgrace from Her Majesty's service, or suffer such other punishment as is herein-after mentioned.

Penalty for quarrelling, &c., or using reproachful speech or gestures.

18. Every person subject to this Act who shall quarrel or fight with any other person, whether such other person be or be not subject to this Act, or shall use reproachful or provoking speeches or gestures tending to make any quarrel or disturbance, shall suffer imprisonment or such other punishment as is herein-after mentioned.

Desertion and Absence without leave.

Penalty for desertion.

19. Every person subject to this Act who shall absent himself from his ship, or from the place where his duty requires him to be, with an intention of not returning to such ship or place, or who shall at any time and under any circumstances when absent from his ship or place of duty, do any act which shows that he has an intention of not returning to such ship or place, shall be deemed to have deserted, and shall be punished accordingly; that is to say,

(1.) If he has deserted to the enemy he shall be punished with death or such other punishment as is herein-after mentioned;

(2.) If he has deserted under any other circumstances, he shall be punished with penal servitude or such other punishment as is herein-after mentioned;

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and in every such case he shall forfeit all pay, head money, bounty, salvage, prize money, and allowances that have been earned by him, and all annuities, pensions, gratuities, medals, and decorations that may have been granted to him, and also all clothes and effects which he may have left on board the ship or at the place from which he has deserted, unless the tribunal by which he is tried, or the Admiralty, shall otherwise direct.

Penalty for inducing any person to desert.

20. Every person subject to this Act who shall endeavour to seduce any other person subject to this Act to desert shall suffer imprisonment or such other punishment as is herein-after mentioned.

Penalty for entertaining a deserter.

21. Every officer in command of any ship of Her Majesty who shall receive or entertain any deserter from Her Majesty's military or naval forces, after discovering him to be a deserter, and shall not with all convenient speed, in the case of a deserter from Her Majesty's naval forces, give notice to the commanding officer of the ship to which such deserter belongs, or, if such ship is at a distance, to the Secretary of the Admiralty or to the Commander-in-chief, or, in case of a deserter from Her Majesty's military forces, give notice to the Secretary of War, or the commanding officer of the regiment to which such deserter belongs, the officer so offending shall be dismissed from Her Majesty's service, or shall suffer such other punishment as is herein-after mentioned.

Punishment for breaking out of ship.

22. If any person subject to this Act (without being guilty of desertion) improperly leaves his ship or place of duty, he shall be liable to imprisonment or to such other punishment as is herein-after mentioned, and to such other punishment by forfeiture of wages or of other benefits as the Admiralty from time to time by regulations prescribe.

Penalty for absence without leave.

23. Every person subject to this Act who (without being guilty of desertion or of improperly leaving his

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ship or place of duty) shall be absent without leave shall be liable to imprisonment or detention for any period not exceeding ten weeks, or such other punishment as the circumstances of the case may require, and to such other punishment by forfeiture of wages or of other benefits as the Admiralty from time to time by regulations prescribe.

Forfeiture of effects for absence without leave.

24. If any person subject to this Act is absent without leave for a period of one month (whether he is guilty of desertion or of improperly leaving his ship or place of duty or not), but is not apprehended and tried for his offence, he shall be liable to forfeiture of wages and other benefits as the Admiralty from time to time by regulations prescribe, and the Admiralty, or, on a foreign station, the Commander-in-Chief, may by an order containing a statement of the absence without leave direct that the clothes and effects (if any) left by him on board ship or at his place of duty be forfeited, and the same may be sold, and the proceeds of the sale shall be disposed of as the Admiralty or the Commander-in-Chief (as the case may be) may direct; and every order under this provision for forfeiture or sale shall be conclusive as to the fact of the absence without leave as therein stated of the person therein named; but in any case the Admiralty may, if it seems fit on sufficient cause being shown at any time after forfeiture and before sale, remit the forfeiture, or after sale pay or dispose of the proceeds of the sale or any part thereof to or for the use of the person to whom the clothes or effects belonged, or his representatives.

Penalty for assisting, &c., desertion.

25. If any person not subject to this Act assists or procures any person subject to this Act to desert or improperly absents himself from his duty, or conceals, employs, or continues to employ any person subject to this Act, who is a deserter or improperly absent from his

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duty, knowing him to be a deserter or so improperly absent, he shall, for every such offence of assistance, procurement, concealment, employment, or continuance of employment, be liable, on summary conviction thereof before a justice or justices, or before any person or persons or court exercising like authority in any part of Her Majesty's Dominions, to a penalty not exceeding thirty pounds; and, notwithstanding anything in any Act relating to municipal corporations, or to the Metropolitan Police, or in any other Act, every such penalty shall be applied as the Admiralty direct.

Penalty for persuading to desertion, &c.

26. If any person not subject to this Act by words or otherwise persuades any person subject to this Act to desert or improperly absent himself from his duty, he shall for every such offence be liable, on summary conviction thereof before a justice or justices, or before any person or persons or court exercising like authority in any part of Her Majesty's Dominions, to a penalty not exceeding twenty pounds; and, notwithstanding anything in any Act relating to muncipal corporations, or to the Metropolitan Police, or in any other Act, every such penalty shall be applied as the Admiralty direct.

Miscellaneous Offences.

Penalty for profane swearing and other immoralities.

27. Every person subject to this Act who shall be guilty of any profane oath, cursing, execration, drunkenness, uncleanness, or other scandalous action in derogation of God's honour and corruption of good manners, shall be dismissed from Her Majesty's service, with disgrace, or suffer such other punishment as is herein-after mentioned.

Penalty on officer for cruelty or oppression.

28. Every officer subject to this Act who shall be guilty of cruelty, or of any scandalous or fraudulent conduct, shall be dismissed with disgrace from Her Majesty's service; and every officer subject to this Act who shall be guilty of any other conduct unbecoming the

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character of an officer shall be dismissed, with or without disgrace, from Her Majesty's service.

Penalty for suffering ships to be improperly lost.

29. Every person subject to this Act who shall either designedly or negligently or by any default lose, strand, or hazard, or suffer to be lost, stranded, or hazarded, any ship of Her Majesty or in Her Majesty's service, shall be dismissed from Her Majesty's service, with disgrace, or suffer such other punishment as is herein-after mentioned.

Penalty for not taking care of and defending ships under convoy.

30. The officers of all ships of Her Majesty appointed for the convoy and protection of any ships or vessels shall diligently perform their duty without delay according to their instructions in that behalf; and every officer who shall fail in his duty in this respect, and shall not defend the ships and goods under his convoy, without deviation to any other objects, or shall refuse to fight in their defence if they are assailed, or shall cowardly abandon and expose the ships in his convoy to hazard, or shall demand or exact any money or other reward from any merchant or master for convoying any ships or vessels instrusted to his care, or shall misuse the masters or mariners thereof, shall make such reparation in damages to the merchants, owners, and others as the Court of Admiralty may adjudge, and also shall be punished criminally according to the nature of his offence, by death or such other punishment as is herein-after mentioned.

Master of merchant vessel to obey orders of convoying officer.

31. Every master or other officer in command of any merchant or other vessel under the convoy of any ship of Her Majesty shall obey the commanding officer thereof in all matters relating to the navigation or security of the convoy, and shall take such precautions for avoiding the enemy as may be directed by such commanding officer; and if he shall fail to obey such directions, such commanding officer may compel obedience by force of

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arms, without being liable for any loss of life or of property that may result from his using such force.

Penalty for taking any goods on board other than for the use of the vessel except gold, silver, jewels, &c.

32. Every officer in command of any of Her Majesty's ships who shall receive on board or permit to be received on board such ship any goods or merchandises whatsoever, other than for the sole use of the ship, except gold, silver, or jewels, and except goods and merchandise belonging to any merchant, or on board any ship which may be shipwrecked or in imminent danger, either on the high seas or in some port, creek, or harbour, for the purpose of preserving them for their proper owners, or except such goods or merchandise as he may at any time be ordered to take or receive on board by order of the Admiralty or his superior officer, shall be dismissed from Her Majesty's service, or suffer such other punishment as is herein-after mentioned.

Penalty for embezzling public stores.

33. Every person subject to this Act who shall wastefully expend, embezzle, or fraudulently buy, sell or receive any ammunition, provisions, or other public stores, and every person subject to this Act, who shall knowingly permit any such wasteful expenditure, embezzlement, sale, or receipt, shall suffer imprisonment or such other punishment as is herein-after mentioned.

Penalty for burning any magazine or vessel, &c., not belonging to an enemy.

34. Every person subject to this Act who shall unlawfully set fire to any dockyard, victualling yard, or steam factory yard, arsenal, magazine, building, stores, or to any ship, vessel, hoy, barge, boat, or other craft or furniture thereunto belonging, not being the property of an enemy, pirate, or rebel, shall suffer death or such other punishment as is herein-after mentioned.

Penalty for making or signing false musters.

35. Every person subject to this Act who shall knowingly make or sign a false muster or record or other official document, or who shall command, counsel, or procure the making or signing thereof, or who shall

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aid or abet any other person in the making or signing thereof, shall be dismissed from Her Majesty's service with disgrace, or suffer such other punishment as is herein-after mentioned.

Penalty for misconduct in hospital.

36. Every person subject to this Act who shall wilfully do any act, or wilfully disobey any orders, whether in hospital or elsewhere, with intent to produce or to aggravate any disease or infirmity, or to delay his cure, or who shall feign any disease, infirmity, or inability to perform his duty, shall suffer imprisonment or such other punishmsnt as is herein-after mentioned.

Penalty for endeavouring to stir up any disturbance on account of unwholesomeness of the victuals or other just grounds.

37. Every person subject to this Act who shall have any cause of complaint, either of the unwholesomeness of the victuals or upon any other just ground, shall quietly make the same known to his superior, or captain, or commander-in-chief, and the said superior, captain, or commander-in-chief shall, as far as he is able, cause the same to be presently remedied; and no person subject to this Act upon any pretence whatever shall attempt to stir up any disturbance, upon pain of such punishment as a court-martial may think fit to inflict, according to the degree of offence.

Penalty for not sending to the Court of Admiralty all papers found aboard prize ships.

38. All the papers, charter-parties, bills of lading, passports, and other writings whatsoever that shall be taken, seized, or found aboard any ship or ships which shall be taken as prize shall be duly preserved, and the commanding officer of the ship which shall take such prize shall send the originals entire and without fraud to the Court of Admiralty, or such other court or commissioners as shall be authorized to determine whether such prize be lawful capture, there to be viewed, made use of, and proceeded upon according to law, upon pain that every person offending herein shall be dismissed from Her Majesty's service, or shall suffer such other punishment as is herein-after mentioned, and in

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addition thereto shall forfeit and lose his share of the capture.

Penalty for taking money or other effects out of any prize before the same shall be condemned.

39. No person subject to this Act shall take out of any prize or ship seized for prize any money, plate, or goods, unless it shall be necessary for the better securing thereof, or for the necessary use and service of any of Her Majesty's ships and vessels of war, before the same be adjudged lawful prize in some Admiralty Court; but the full and entire account of the whole without embezzlement shall be brought in, and judgment passed entirely upon the whole, without fraud, upon pain that every person offending herein shall be dismissed from Her Majesty's service, with disgrace, or suffer such other punishment as is herein-after mentioned, and in addition thereto forfeit and lose his share of the capture.

Penalty for stripping or ill-using persons taken on board a prize.

40. If any ship or vessel shall be taken as prize, none of the officers, mariners, or other persons on board her shall be stripped of their clothes, or in any sort pillaged, beaten, or evil intreated, upon pain that the person or persons so offending shall be dismissed from Her Majesty's service, with disgrace, or suffer such other punishment as is herein-after mentioned.

Penalty on commanders capturing as prize by collusion, or collusively restoring ships or goods.

41. If the commanding officer of any of Her Majesty's ships does any of the following things, namely,

(1.) By collusion with the enemy takes as prize any vessel, goods, or thing;

(2.) Unlawfully agrees with any person for the ransoming of any vessel, goods, or thing taken as prize; or

(3.) In pursuance of any unlawful agreement for ransoming or otherwise by collusion actually quits or restores any vessel, goods, or thing taken as prize;

he shall be liable to dismissal from Her Majesty's service,

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with disgrace, or to such other punishment as is herein-after mentioned.

Penalty for breaking bulk on board prize ship with a view to embezzlement.

42. If any person subject to this Act breaks bulk on board any vessel taken as prize, or detained in the exercise of any belligerent right, or under any Act relating to piracy or to the slave trade or to the Customs, with intent to embezzle anything therein or belonging thereto, he shall be liable to dismissal from Her Majesty's service, with disgrace, or to such other punishment as is herein-after mentioned, and in addition thereto to forfeit and lose his share of the capture.

Penalty for offences against naval discipline not particularly mentioned.

43. Every person subject to this Act who shall be guilty of any act, disorder, or neglect to the prejudice of good order and naval discipline, not herein-before specified, shall be dismissed from Her Majesty's service, with disgrace, or suffer such other punishment as is herein-after mentioned.

Crimes to be punished according to laws and customs in use.

44. Any person subject to this Act committing any offence against this Act, such offence not being punishable with death or penal servitude, shall, save where this Act expressly otherwise provides, be proceeded against and punished according to the laws and customs in such cases used at sea.

Offences punishable by ordinary Law.

Penalty for offences punishable by ordinary law.

45. Every person subject to this Act who shall be guilty of murder shall suffer death:

If he shall be guilty of manslaughter he shall suffer penal servitude, or such other punishment as is herein-after mentioned:

If he shall be guilty of sodomy with man or beast he shall suffer penal servitude[1]:

[1] Under the Penal Servitude Act, 1891, s. 1 (2), a court may, in its discretion, award imprisonment for any term not exceeding two years, with or without hard labour, instead of penal servitude.

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If he shall be guilty of an indecent assault he shall suffer penal servitude or such other punishment as is herein-after mentioned:

If he shall be guilty of robbery or theft he shall suffer penal servitude or such other punishment as is herein-after mentioned:

If he shall be guilty of any other criminal offence which if committed in England would be punishable by the law of England, he shall, whether the offence be or be not committed in England, be punished either in pursuance of the first part of this Act as for an act to the prejudice of good order and naval discipline not otherwise specified, or the offender shall be subject to the same punishment as might for the time being be awarded by any ordinary criminal tribunal competent to try the offender if the offence had been committed in England.

Offences, when punishable.

46. For all offences specified or referred to in this Act, if committed by any person subject thereto in any harbour, haven, or creek, or on any lake or river, whether in or out of the United Kingdom, or anywhere within the jurisdiction of the Admiralty, or at any place on shore out of the United Kingdom of Great Britain and Ireland, or in any of Her Majesty's dockyards, victualling yards, steam factory yards, or on any gun wharf, or in any arsenal, barrack, or hospital belonging to Her Majesty, whether in or out of the said United Kingdom, the offender may be tried and punished under this Act; and for all offences herein-before specified under the headings "misconduct in the presence of the enemy," "communications with the enemy," "neglect of duty," "mutiny," "insubordination," "desertion and absence without leave," or "miscellaneous offences," if committed by any person subject to this Act at any place on shore, whether in or out of the said United Kingdom, the offender may be tried and punished under this Act.

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PART II.

General Provisions.

Power of court-martial to find intent with which offence committed.

47. Where the amount of punishment for any offence under this Act depends upon the intent with which it has been committed, and any person is charged with having committed such offence with an intent involving a greater degree of punishment, a court-martial may find that the offence was committed with an intent involving a less degree of punishment, and award such punishment accordingly.

Power of court-martial to find prisoner guilty of lesser offence on charge of greater.

48. Where any person shall be charged with murder, a court-martial may find him guilty of manslaughter or of a common assault; where he shall be charged with sodomy, a court-martial may find him guilty of an indecent assault; where he shall be charged with theft, a court-martial may find him guilty of an attempt to thieve, or of embezzlement, or of wrongful appropriation of property belonging to another; and generally where any person shall be charged with any offence under this Act he may, upon failure of proof of the commission of the greater offence, be found guilty of another offence of the same class involving a less degree of punishment, but not of any offence involving a greater degree of punishment.

Rebels and mutineers to be deemed enemies.

49. All armed rebels, armed mutineers, and pirates shall be deemed to be enemies within the meaning of this Act.

Power to arrest offenders.

50. Every officer in command of a fleet or squadron of Her Majesty's ships, or of one of Her Majesty's ships, or the senior officer present at a port, may, by warrant under his hand, authorize any person to arrest any offender subject to this Act for any offence against this Act mentioned in such warrant; and any such warrant

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may include the names of more persons than one in respect of several offences of the same nature; and any person named in any such warrant may forthwith, on his apprehension, if the warrant so directs, be taken on board the ship to which he belongs, or some other of Her Majesty's ships; and any person so authorized may use force, if necessary, for the purpose of effecting such apprehension, towards any person subject to this Act.

Penalty for not assisting in detection of prisoners.

51. Every person subject to this Act who shall not use his utmost endeavours to detect, apprehend, and bring to punishment all offenders against this Act, and shall not assist the officers appointed for that purpose, shall suffer imprisonment or such other punishment as is herein-after mentioned.

PART III.

Regulations as to Punishments.

Punishments.

52. The following punishments may be inflicted in Her Majesty's navy:

(1.) Death:
(2.) Penal servitude:
(3.) Dismissal with disgrace from Her Majesty's service:
(4.) Imprisonment or corporal punishment:
(4A.) Detention:
(5.) Dismissal from Her Majesty's service:
(6.) Forfeiture of seniority as an officer for a specified time, or otherwise:
(7.) Dismissal from the ship to which the offender belongs:
(8.) Severe reprimand, or reprimand:
(9.) Disrating a subordinate or petty officer:
(10.) Forfeiture of pay, head money, bounty, salvage,

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prize money, and allowances earned by, and of all annuities, pensions, gratuities, medals, and decorations granted to the offender, or of any one or more of the above particulars; also, in the case of desertion, of all clothes and effects left by the deserter on board the ship to which he belongs:

(11.) Such minor punishments as are now inflicted according to the custom of the navy, or may from time to time be allowed by the Admiralty:

And each of the above punishments shall be deemed to be inferior in degree to every punishment preceding it in the above scale.

Regulations as to infliction of punishments.

53. The following regulations are hereby made with respect to the infliction of punishments in Her Majesty's navy:—

(1.) The Admiralty may, except in case of sentence of death, which shall only be remitted by Her Majesty, suspend, annul, or modify any sentence passed on any person subject to this Act, or substitute a punishment inferior in degree for the punishment involved in any such sentence, or remit the whole or any portion of the punishment involved in any such sentence, or remit the whole or any portion of any punishment into which the punishment involved in any such sentence has been commuted, and any sentence so modified shall (subject to the provisions of this Act) be valid, and shall be carried into execution, as if it had been originally passed, with such modification, by the court-martial; but so that neither the degree nor duration of the punishment involved in any sentence be increased by any such modification:

(2.) Judgment of death shall not be passed on any prisoner unless four at least of the officers present at the court-martial, where the number does not

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exceed five, and in other cases a majority of not less than two thirds of the officers present, concur in the sentence:

(3.) Except in case of mutiny, the punishment of death shall not be inflicted on any prisoner until the sentence has been confirmed by the Admiralty or by the commander-in-chief on a foreign station:

(4.) The punishment of penal servitude may be inflicted for the term of life, or for any other term of not less than *three*[1] years:

(5.) The punishment of penal servitude shall in all cases involve dismissal with disgrace from Her Majesty's service:

(6.) A sentence of dismissal with disgrace shall involve in all cases a forfeiture of all pay, head money, bounty, salvage, prize money, and allowances that have been earned by, and of all annuities, pensions, gratuities, medals, and decorations that may have been granted to the offender, and an incapacity to serve Her Majesty again in any military, naval, or civil service, and may also in all cases be accompanied by a sentence of imprisonment:

(7.) The punishment of imprisonment may be inflicted for any term not exceeding two years:

(8.) A sentence of imprisonment may be accompanied with a direction that the prisoner shall be kept in solitary confinement for any period of such term, not exceeding fourteen days at any one time, and not exceeding eighty-four days in any one year, with intervals between the periods of solitary confinement of not less duration than the periods of solitary confinement; and when the imprisonment awarded exceeds eighty-four days, the

[1] Under the Penal Servitude Act, 1891, the lowest term of penal servitude that can be inflicted is reduced from five to three years. See p. 242.

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solitary confinement shall not exceed seven days in any twenty-eight days of the whole imprisonment awarded, with intervals between the periods of solitary confinement of not less duration than such periods:

(9.) A sentence of imprisonment may also be accompanied with a direction that the prisoner shall be kept to hard labour for all or any part of the term of imprisonment, and corporal punishment may be awarded in addition to any sentence of imprisonment, whether such imprisonment is or is not to be accompanied with solitary confinement and hard labour, or either of them:

(9A.) The punishment of detention may be inflicted for any term not exceeding two years:

(10.) The punishment of imprisonment, or detention, whether on board ship or on shore, shall involve disrating in case of a petty officer and reduction to the ranks in case of a non-commissioned officer of marines, and shall in all cases be accompanied by stoppage of pay or wages during the term of imprisonment or detention: Provided that where the punishment awarded is detention for a term not exceeding fourteen days, the sentence may direct that the punishment shall not be accompanied by stoppage of pay or wages during the term of detention:

(11.) In any case of corporal punishment not more than forty-eight lashes shall be inflicted: no officer shall be subject to detention or to corporal punishment: no petty or non-commissioned officer shall be subject to corporal punishment except in case of mutiny:

All other punishments authorized by this Act may be inflicted in the manner heretofore in use in the navy.

Limitation of time to trials.

54. No person, unless he be an offender who has

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avoided apprehension or fled from justice, shall be tried or punished in pursuance of this Act for any offence committed by him unless such trial shall take place within three years from the commission of such offence, or within one year after the return of such offender to the United Kingdom, where he has been absent from the United Kingdom during such period of three years.

Scale of punishment.

55. Subject to the foregoing regulations, where any punishment is specified by this Act as the penalty for any offence, and it is further declared that another punishment may be awarded in respect of the same offence, the expression "other punishment" shall be deemed to comprise any one or more of the punishments inferior in degree to the specified punishment, according to the scale herein-before mentioned; but corporal punishment shall be deemed equal in degree to imprisonment, and may in all cases, subject to the foregoing regulations, be inflicted as a substitute for or in addition to imprisonment.

Authorities having power to try offences.

56. (1.) Any offence triable under this Act may be tried and punished by court-martial.

(2.) Any offence not capital which is triable under this Act, and (except in the cases by this Act expressly provided for) is not committed by an officer, may, under such regulations as the Admiralty from time to time issue, be summarily tried and punished by the officer in command of the ship to which the offender belongs at the time either of the commission or of the trial of the offence, subject to the restriction that the commanding officer shall not have power to award penal servitude or to award imprisonment or detention for more than three months.

(3.) The power by this section vested in an officer commanding a ship may,—

(*a.*) as respects persons on board a tender to the ship,

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be exercised, when the tender is absent from the ship, by the officer in command of the tender; and

(*b.*) as respects persons on board any boat or boats belonging to the ship, be exercised, when such boat or boats is or are absent on detached service, by the officer in command of the boat or boats; and

(*c.*) as respects persons subject to this Act on shore on detached service, or such of those persons as are not for the time being made subject to military law by an order under section one hundred and seventy-nine of the Army Act, 1881, be exercised by the officer in immediate command on shore of those persons.

(4.) Except in case of mutiny, no man shall be sentenced by the commanding officer to corporal punishment until his offence has been inquired into by one or more officers appointed by such commanding officer, and his or their opinion as to the guilt or innocence of the person charged reported to such commanding officer, and the commanding officer shall thereupon act as according to his judgment may seem right.

Authorities empowered to impose punishments to adhere to provisions herein named.

57. With respect to the authorities by whom certain punishments may be imposed, the following provisions shall take effect; namely,

(1.) With respect to any subordinate officer, the punishment of forfeiture of time or seniority may be imposed as follows; namely, by the Admiralty for any time not exceeding twelve months, by the commander-in-chief on a foreign station for any time not exceeding six months, or by the commanding officer for any time not exceeding three months:

(2.) With respect to any subordinate officer, the commander-in-chief on a foreign station shall

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have power to impose the punishments numbered (7), (8), and (9) in the scale herein-before contained.

PART IV.

COURTS-MARTIAL.

Constitution of Courts-martial.

Constitution of courts-martial.

58. The following regulations are hereby made with respect to courts-martial:

(1.) A court-martial shall consist of not less than five nor more than nine officers:

(2.) No officer shall be qualified to sit as a member of any court-martial held in pursuance of this Act unless he be a flag officer, captain, commander, or lieutenant of Her Majesty's navy on full pay:

(3.) A court-martial shall not be held unless at least two of Her Majesty's ships, not being tenders, and commanded by captains, commanders, or lieutenants of Her Majesty's navy on full pay, are together at the time when such court-martial is held:

(4.) No officer shall sit on a court-martial who is under twenty-one years of age:

(5.) No court-martial for the trial of a flag officer shall be duly constituted unless the president is a flag officer, and the other officers composing the court are of the rank of captain, or of higher rank:

(6.) No court-martial for the trial of a captain in Her Majesty's navy shall be duly constituted unless the president is a captain or of higher rank, and the other officers composing the court are commanders or officers of higher rank:

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(7.) No court-martial for the trial of a person below the rank of captain in Her Majesty's navy shall be duly constituted, unless the president is a captain or of higher rank, nor, if the person to be tried is of the rank of commander, unless in addition to the president two other members of the court are of the rank of commander or of higher rank:

(8.) The prosecutor shall not sit on any court-martial for the trial of a person whom he prosecutes:

(9.) The Admiralty shall have power to order courts-martial to be held for the trial of offences under this Act, and to grant commissions to any officer of Her Majesty's navy on full pay authorizing him to order courts-martial to be held for the trial of such offences:

(10.) An officer holding a commission from the Admiralty to order courts-martial shall not be empowered to do so if there is present at the place where such court-martial is to be held any officer superior in rank to himself on full pay and in command of one or more of Her Majesty's ships or vessels, although such last-mentioned officer may not hold a commission to order courts-martial; and in such a case such last-mentioned officer may order a court-martial, although he does not hold any commission for the purpose:

(11.) If any officer holding a commission from the Admiralty to order courts-martial, having the command of a fleet or squadron, and being in foreign parts, die, be recalled, leave his station, or be removed from his command, the officer upon whom the command of the fleet or squadron devolves, and so from time to time the officer who shall have the command of the fleet or squadron, shall, without any commission from the Admiralty,

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have the same power to order courts-martial as the first-mentioned officer was invested with:

(12.) If any officer holding a commission from the Admiralty to order courts-martial, and having the command of any fleet or squadron of Her Majesty's ships in foreign parts shall detach any part of such fleet or squadron, or separate himself from any part of such fleet or squadron, he may, by commission under his hand, empower, in the first-mentioned case, the commanding officer of the squadron or detachment ordered on such separate service, and in case of his death or ceasing so to command, the officer to whom the command of such separate squadron or detachment shall belong, and in the secondly-mentioned case the senior officer of Her Majesty's ships on the division of the station from which he is absent, to order courts-martial during the time of such separate service, or during his absence from that division of the station (as the case may be), and every such authority shall continue in force until revoked, or until the officer holding it returns to the United Kingdom or until he comes into the presence of a superior officer, empowered to order courts-martial in the same squadron, detachment, or division of a station, but so that such authority shall revive on the officer holding it ceasing to be in the presence of such a superior officer, and so from time to time as often as the case so requires:

(13.) The officer ordering a court-martial shall not sit thereon:

(14.) The president of every court-martial shall be named by the authority ordering the same, or by any officer empowered by such authority to name the president:

(15.) No commander or lieutenant shall be required

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to sit as a member of any court-martial when four officers of a higher rank and junior to the president can be assembled at the place where the court-martial is to be holden (but the regularity or validity of any court-martial or of the proceedings thereof, shall not be affected by any commander or lieutenant being required to sit, or sitting, thereon, under any circumstances); and when any commander or lieutenant sits on any court-martial the members of it shall not exceed five in number:

(16.) Subject to the foregoing regulations, whenever a court-martial shall be held, the officer appointed to preside thereat shall summon all the officers next in seniority to himself present at the place where the court-martial shall be held to sit thereon, until the number of nine, or such number, not less than five, as is attainable, is complete; subject to this proviso, that the admirals and captains, being superintendents of Her Majesty's dockyards, shall not be summoned to sit on courts-martial unless specially directed to do so by orders from the Admiralty.

Proceedings of Courts-martial.

Where courts-martial to be held.

59. A court-martial under this Act shall be held on board one of Her Majesty's ships or vessels of war.

As to time of sittings of courts-martial.

60. A court-martial held in pursuance of this Act shall sit from day to day, with the exception of Sundays, until sentence is given, unless prevented from so doing by stress of weather or unavoidable accident, and its proceedings shall not be delayed by the absence of any member, so that not less than four are present; and no member shall absent himself unless compelled so to do by sickness or other just cause, to be approved of by the other members of the court, and if any member of a

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court-martial shall absent himself therefrom, in contravention of this section, he shall be dismissed from Her Majesty's service, or shall suffer such other punishment as may be awarded by a court-martial.

Appointment of officiating judge advocate.

61. In the absence of the judge advocate of the fleet or his deputy, and in default of any appointment in this behalf by the Admiralty, or by the commander-in-chief of any fleet or squadron, the officer who is to be the president of the court-martial shall appoint a person to officiate as deputy judge advocate at the trial; and the judge advocate of the fleet for the time being, or his deputy, or the person officiating as deputy judge advocate, at any trial shall administer an oath to every witness appearing at the trial.

Proceedings at trial.

62. As soon as the court is assembled, the names of the officers composing the court shall be read over to the person charged, who shall be asked if he objects to being tried by any member of the court; if the person charged shall object to any member, the objection shall be decided by the court; if the objection shall be allowed, the place of the member objected to shall be filled up by the officer next in seniority who is not on the court-martial, subject to the regulations herein-before contained.

The person charged may then raise any other objection which he desires to make respecting the constitution of the court-martial, and the objection shall then be decided by the court, which decision shall be final, and the constitution of the court-martial shall not be afterwards impeached, and it shall be deemed to have been in all respects duly constituted.

Oaths to be administered to members of courts-martial.

63. Before the court shall proceed to try the person charged, the judge advocate of the fleet, or his deputy, or the person officiating as deputy judge advocate of the fleet, shall administer to every member of the court the following oath; that is to say,

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'I do swear, that I will duly administer justice according to law, without partiality, favour, or affection; and I do further swear, that I will not on any account, at any time whatsoever, disclose or discover the vote or opinion of any particular member of this court-martial, unless thereunto required in due course of law. So help me GOD.'

Oaths to be administered to judge advocate &c.

64. As soon as the said oath shall be administered to the members of the court-martial, the president shall administer to the judge advocate of the fleet, or his deputy, or the person officiating as deputy judge advocate, the following oath:

'I do swear, that I will not upon any account, at any time whatsoever, disclose or discover the vote or opinion of any particular member of the court-martial, unless thereunto required in due course of law. So help me GOD.'

Power to Admiralty to frame general orders for practice of courts-martial, subject to approval by Her Majesty in Council.

65. The Admiralty may from time to time frame general orders for altering and regulating (subject to the provisions of this Act) the procedure and practice of courts-martial under this Act; and any such general orders shall have full effect if and when approved by Her Majesty in Council, on a report of the Judicial Committee of the Privy Council, but not sooner or otherwise; and every Order in Council made under this section shall be laid before both Houses of Parliament.

Summoning witnesses.

66. Every person, civil, naval, and military, who may be required to give evidence before a court-martial, shall be summoned by writing under the hand of one of the secretaries of the Admiralty, or by the deputy judge advocate, or the person appointed to officiate as deputy judge advocate at the trial; and all persons so summoned and attending as witnesses before any court-martial shall, during their necessary attendance in or on such court, and in going to and returning from the same, be

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privileged from arrest, and shall, if unduly arrested, be discharged by the court out of which the writ or process issued by which such witness was arrested, or if such court be not sitting, then by any judge of the superior courts of law in London or Dublin, or the Court of Session in Scotland, or of the courts of law in the East or West Indies or elsewhere, according as the case shall require, upon its being made to appear to such court or judge, by any affidavit in a summary way, that such witness was arrested in going to or returning from or attending upon such court-martial; and all witnesses so duly summoned as aforesaid who make default in attending on such courts, or attending refuse to be sworn or make affirmation, or being sworn or having made affirmation refuse to give evidence, or to answer all such questions as the court may legally demand of them, or prevaricate in giving their evidence, shall upon certificate thereof under the hand of the president of such court-martial, be liable to be attached in the Court of Queen's Bench in London or Dublin, or the Court of Session, or Sheriff depute or stewarts depute, or their respective substitutes, within their several shires and stewartries in Scotland, or courts of law in the East or West Indies, or in any of Her Majesty's colonies, garrisons, or dominions in Europe or elsewhere, respectively, upon complaint made, in like manner as if such witness after having been duly summoned and subpœnaed had neglected to attend on a trial in any proceeding in the court in which such complaint is made, or had refused to be sworn, or on being sworn had refused to give evidence, or to answer all such questions as the court may legally demand, or had prevaricated in giving evidence, or, if the court-martial shall think fit, in case any such person belong to Her Majesty's navy, being called upon to give evidence at any court-martial, shall refuse or neglect to attend to give his evidence upon oath or

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affirmation, or shall prevaricate in his evidence, or behave with contempt to the court, such court-martial may punish every such offender by imprisonment, or, if the offender is a person liable to be sentenced to detention under this Act, by detention not longer than three months in case of such refusal, neglect, or prevarication, nor longer than one month in the case of such contempt; and every person not subject to this Act who may be so summoned to attend shall be allowed and paid his reasonable expenses for such attendance, under the authority of the Admiralty, or of the president of the court-martial on a foreign station.

Penalty on persons giving false evidence.

67. Every person who, upon any examination upon oath or upon affirmation before any court-martial held in pursuance of this Act, shall wilfully and corruptly give false evidence, shall be deemed guilty of wilful and corrupt perjury: and every such offence, wheresoever committed, shall be triable and punishable in England; and where any such offence committed out of England is tried in England, all statutes and laws applicable to cases of perjury shall apply to the case.

Where persons are insane at the time of offence or trial.

68. Where it shall appear upon the trial by court-martial of any person charged with an offence that such person is insane, the court shall find specially the fact of his insanity, and shall order such person to be kept in strict custody in such place and in such manner as the court shall deem fit until the directions of the Admiralty thereupon are known, and it shall be lawful for the Lords of the Admiralty to give orders for the safe custody of such person during Her Majesty's pleasure in such place and in such manner as they shall think fit.

Report of proceedings of courts-martial to be transmitted.

69. Every judge advocate, or deputy judge advocate, or person officiating as deputy judge advocate, shall transmit with as much expedition as may be the original

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proceedings, or a complete and authenticated copy thereof, and the original sentence of every court-martial attended by him, to the commander-in-chief or senior officer, who shall transmit them to the secretary of the Admiralty for the time being, and any person tried by a court-martial shall be entitled, on demand, to a copy of such proceedings and sentence at any time not sooner than six months after the trial if the same takes place in the Mediterranean, three months if at any other naval station within Europe, and twelve months if elsewhere, (upon payment for the same at the rate of fourpence per folio of seventy-two words,) but no such demand shall be allowed after the space of three years from the date of the final decision of such court.

PART V.

Penal Servitude and Prisons.

Penal Servitude.

Sentence of penal servitude.

70. Where a person is in pursuance of this Act convicted by a court-martial, and either is sentenced or has his sentence commuted to penal servitude, such conviction and sentence shall be of the same effect as if such person had been convicted by a civil court in the United Kingdom of an offence punishable by penal servitude, and sentenced by that court to penal servitude, and all enactments relating to a convict so sentenced shall, so far as circumstances admit, apply accordingly; and the said convict shall be removed to some prison in which a convict so sentenced by a civil court in the United Kingdom can be confined either permanently or temporarily, and the order of the Admiralty or of the commander-in-chief, or of the officer ordering the court-martial by whom such person was convicted, shall be

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a sufficient warrant for the transfer of the said person to such prison to undergo his sentence according to law, and until he reaches such prison for detaining him in naval custody, or in any civil prison or place of confinement.

* * * * *

Subsistence of offender.

72. In case any such offender shall be conveyed to any prison, not being a naval prison appointed by virtue of this Act, an allowance such as the Admiralty shall from time to time direct shall be made to the governor, keeper, or superintendent of the gaol or prison for the subsistence of such offender while he is detained therein, and such allowance shall be paid by order of the Admiralty upon production by the said governor, keeper, or superintendent of a declaration, to be made by him before one of Her Majesty's justices of the peace of such county, of the number of days during which the offender has been so detained and subsisted in such gaol or prison.

Imprisonment of offender already under sentence for previous offence.

73. Whenever sentence shall be passed by a court-martial on an offender already under sentence either of detention, imprisonment or penal servitude, passed upon him by a court-martial for a former offence, the court may award sentence of detention, imprisonment or penal servitude for the offence for which he is under trial to commence at the expiration of the detention, imprisonment or penal servitude to which he has been previously sentenced, although the aggregate of the terms of detention, imprisonment or penal servitude may exceed the term for which any of those punishments could be otherwise awarded.

Provided that nothing in this section shall cause a person to undergo imprisonment or detention for any period exceeding in the aggregate two consecutive years, and so much of any term of imprisonment or detention imposed on a person by a sentence in pursuance of this section as would prolong the total term of his

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punishment beyond that period shall be deemed to be remitted.

Prisons.

Term and place of imprisonment.

74. (1.) Every term of penal servitude, imprisonment or detention in pursuance of this Act shall be reckoned as commencing on the day on which the sentence was awarded, and the place of imprisonment or detention, whether the imprisonment or detention was awarded as an original or as a commuted punishment, shall be such place as may be appointed by the court or the commanding officer awarding the punishment, or which may from time to time be appointed by the Admiralty, or by the commander-in-chief or senior officer present on any foreign station, and may in the case of imprisonment be one of the naval prisons appointed under this Act, or naval detention quarters, or any common gaol, house of correction, or military prison, or detention barrack, and may in the case of detention be any naval detention quarters or a military detention barrack within Her Majesty's dominions.

(2.) Where, by reason of a ship being at sea or off a place at which there is no proper prison or naval detention quarters, a sentence of imprisonment or detention, as the case may be, cannot be duly executed, then, subject as herein-after mentioned, an offender under sentence of imprisonment or detention, as the case may be, may be sent with all reasonable speed to some place at which there is a proper prison or naval detention quarters, or in the case of an offender under sentence of detention, to some place at which there are naval detention quarters, in which the sentence can be duly executed, and on arrival there the offender shall undergo his sentence, in like manner as if the date of such arrival were the day on which the sentence was awarded, and that notwithstanding that in the meanwhile he has returned to his duty or become entitled to his discharge; and the term of imprisonment or detention, as the case may be, shall

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be reckoned accordingly, subject however to the deduction of any time during which he has been kept in confinement in respect of the said sentence.

(3.) Where in pursuance of this Act a person is sentenced to imprisonment or detention, the order of the Admiralty or of the commander-in-chief, or of the officer ordering the court-martial by which such person was sentenced, or, if he was sentenced by the commanding officer of a ship, the order of such commanding officer, shall be a sufficient warrant for the sending of such person to the place of imprisonment or detention, there to undergo his sentence according to law, and until he reaches such place of imprisonment or detention, for detaining him in naval custody, or in the case of a person sentenced to imprisonment, in any civil prison or place of confinement.

Place of imprisonment may be changed, &c.

75. Whenever it is deemed expedient it shall be lawful for the Admiralty, or any such commander-in-chief, by any order in writing from time to time to change the place of confinement of any offender imprisoned or sentenced to be imprisoned or detained in pursuance of this Act, or of any offender undergoing or sentenced to undergo detention, and the gaoler or other person having the custody of such offender shall immediately on the receipt of such order remove such offender to the gaol, prison, or house of correction, or in the case of an offender undergoing or sentenced to undergo detention, to the naval detention quarters mentioned in the said order, or shall deliver him over to naval custody for the purpose of the offender being removed to such prison or naval detention quarters; and every gaoler or keeper of such last-mentioned prison, gaol, or house of correction, or naval detention quarters, shall, upon being furnished with a copy of such order of removal, attested by the secretary of the Admiralty for the time being, receive into his custody and shall confine pursuant to such sentence or order every such offender.

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76. The gaoler or other person removing any offender in pursuance of such order shall be allowed for the charges of such removal a sum not exceeding one shilling a mile, and when any offender is not confined in a naval prison or naval detention quarters, the gaoler or other person in whose custody any such offender may be shall receive such an allowance as the Admiralty shall from time to time direct for every day that such offender is in his custody, to be applied towards his subsistence, and such sum shall be paid to the said gaoler or other person under the authority of the Admiralty, upon the application in writing made to the secretary of the Admiralty by any justice for the county or place in which such gaol, prison, or house of correction shall be situate, with a copy of the sentence or order under which the offender is confined.

Expenses of removal or subsistence of prisoners.

* * * * *

78. Whenever any offender is undergoing imprisonment or detention in pursuance of this Act, it shall be lawful for the Admiralty, or any commander-in-chief on any foreign station, or where an offender is undergoing imprisonment or detention by order of his commanding officer, for such commanding-officer or the Admiralty, or any such commander-in-chief, to give an order in writing directing that the offender be discharged; and it shall also be lawful for the Admiralty or any such commander-in-chief, and any officer commanding any of Her Majesty's ships, by order in writing, to direct that any such offender be delivered over to naval custody for the purpose of being brought before a court-martial, either as a witness, or for trial or otherwise, and such offender shall accordingly, on the production of any such order, be discharged, or be delivered over to such custody.

Proviso for discharge or removal of prisoners.

79. The time during which any offender under sentence of imprisonment or detention is detained in naval custody shall be reckoned as imprisonment or detention

Proviso as to time of detention in naval custody.

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under his sentence for whatever purpose he is so detained; and the governor, gaoler, keeper, or superintendent who shall deliver over any such offender shall again receive him from naval custody, so that he may undergo the remainder of his punishment.

In case of insanity prisoners to be removed to some lunatic asylum.

80. If any person imprisoned or undergoing detention by virtue of this Act shall become insane, and a certificate to that effect shall be given by two physicians or surgeons, the Admiralty shall, by warrant, direct the removal of such person to such lunatic asylum or other proper receptacle for insane persons in the United Kingdom as they may judge proper for the unexpired term of his imprisonment or detention; and if any such person shall in the same manner be certified to be again of sound mind, the Admiralty may issue a warrant for his being removed to such prison or place of confinement; or, in the case of a person sentenced to detention, such naval detention quarters as may be deemed expedient, to undergo the remainder of his punishment, and every gaoler or keeper of any prison, gaol, or house of correction shall receive him accordingly.

Admiralty may set apart buildings and ships as naval prisons. (*See* Army Act, 1881, s. 133.)

81. (1.) The Admiralty may set apart any buildings or vessels, or any parts thereof, as naval prisons or naval detention quarters, and any buildings or vessels, or parts of buildings or vessels, so set apart as naval prisons or naval detention quarters, as the case may be, shall be deemed to be naval prisons or naval detention quarters respectively within the meaning of this Act.

(2.) The Admiralty shall have the same power and authority in respect to naval prisons and naval detention quarters respectively as one of Her Majesty's Principal Secretaries of State has in relation to military prisons and detention barracks respectively under section one hundred and thirty-three of the Army Act, 1881,[1] and that section shall apply as if it were herein re-enacted

[1] As amended by the Army Act, 1907. See M. M. L. 382.

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with the substitution of "the Admiralty" for "a Secretary of State," and of "naval" for "military," and of "naval detention quarters" for "detention barrack," and rules and regulations may be made accordingly by the Admiralty.

Penalties on aiding escape or attempt to escape of prisoners and on breach of prison regulations.

82. If any person shall convey or cause to be conveyed into any such naval prison or any such naval detention quarters any arms, tools, or instruments, or any mask or other disguise, to facilitate the escape of any prisoner or person undergoing detention, or by any means whatever shall aid any prisoner or person undergoing detention to escape or in an attempt to escape from such prison or naval detention quarters, whether an escape be actually made or not, such person shall be deemed guilty of felony, and upon being convicted thereof shall be imprisoned, with or without hard labour, for any term not exceeding two years, or suffer penal servitude for any term not exceeding fourteen years; and if any person shall bring or attempt to bring into such prison or naval detention quarters, in contravention of the rules, any spirituous or fermented liquor, he shall for every such offence be liable to a penalty not exceeding twenty pounds and not less than ten pounds; and if any person shall bring into such prison or naval detention quarters, or to or for any prisoner or person undergoing detention, without the knowledge of the officer having charge or command thereof, any money, clothing, provisions, tobacco, letters, papers, or other articles not allowed by the rules of the prison or naval detention quarters to be in the possession of a prisoner or person undergoing detention, or shall throw into the said prison or naval detention quarters any such articles, or by desire of any prisoner or person undergoing detention, without the sanction of the said officer, shall carry out of the prison or naval detention quarters any of the articles aforesaid, he shall for every such offence be liable to a penalty not exceeding five pounds; and if any

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person shall interrupt any officer of such prison or naval detention quarters in the execution of his duty, or shall aid or excite any person to assault, resist, or interrupt any such officer, he shall for every such offence be liable to a penalty not exceeding five pounds, or if the offender be a prisoner or person undergoing detention he shall, upon conviction thereof before two justices of the peace, or not less than three of the visitors of the prison or naval detention quarters, be liable to be sentenced for every such offence to be imprisoned, either with or without hard labour, and with or without solitary confinement, for any time not exceeding six calendar months, in addition to so much of the time for which he was originally sentenced as may be then unexpired, and every penalty which may be incurred under this section shall be recoverable in a summary manner; and such two justices or three visitors are hereby authorized to issue warrants of distress and sale of the offender's goods, and every such penalty shall be applied as the Admiralty shall direct, any law, statute, charter, or custom to the contrary notwithstanding.

Penalty as regards gaolers, &c.

83. Every governor, gaoler, and keeper of any prison, gaol, or house of correction, or of any naval detention quarters, and every officer having the charge or command of any place, ship, or vessel for imprisonment, who shall, without lawful excuse, refuse or neglect to receive or confine, remove, discharge, or deliver up any offender against the provisions of this Act, or any of them, shall incur for every such refusal or neglect a penalty not exceeding one hundred pounds to be recovered in a summary manner before two justices of the peace; and such two justices are hereby authorized to issue warrants of distress and sale of the offender's goods, and every such penalty shall be applied as the Admiralty shall direct, any law, statute, charter, or custom to the contrary notwithstanding.

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PART VI.

Supplemental Provisions.

Short title.

84. This Act may be cited for all purposes as the Naval Discipline Act.

Commencement of Act.

85. Except as otherwise provided, this Act shall be in force within the United Kingdom; and as regards the United Kingdom the enactments described in the schedule to this Act shall be repealed from and after one calendar month from the passing hereof; and as regards elsewhere this Act shall be in force, and the said enactments shall be repealed, from and after six calendar months from the passing hereof.

Definition of terms.

86. In the construction of this Act, unless there be something in the context or subject matter repugnant to or inconsistent with such construction,

"Admiralty," or "the Lords of the Admiralty," shall mean the Lord High Admiral for the time being of the United Kingdom of Great Britain and Ireland, and when there shall be no such Lord High Admiral in office, any two or more of the Commissioners for executing the office of Lord High Admiral of the United Kingdom:

"Officer," shall mean an officer belonging to one of Her Majesty's ships, and shall include a subordinate and a warrant officer, but shall not extend to petty and non-commissioned officers.

When the words "superior officer" are used in this Act they shall be held to include all officers, including petty and non-commissioned officers.

Persons subject to this Act.

87. Every person in or belonging to Her Majesty's navy, and borne on the books of any one of Her Majesty's ships in commission shall be subject to this Act; and all other persons hereby made liable thereto

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shall be triable and punishable under the provisions of this Act.

Land forces embarked as passengers.

88. Her Majesty's land forces, when embarked on board any of Her Majesty's ships, shall be subject to the provisions of this Act to such extent and under such regulations as Her Majesty, her heirs and successors, by any Order or Orders in Council, shall at any time or times direct.

Other persons embarked as passengers.

89. All other persons ordered to be received or being passengers on board any of Her Majesty's ships shall be deemed to be persons subject to this Act, under such regulations as the Admiralty may from time to time direct.

Provisions respecting discipline in hired ships in Her Majesty's service in war.

90. With respect to hired vessels in Her Majesty's Service in time of war, being either armed or under the command of an officer in Her Majesty's Naval Service, the following provisions shall take effect if in any case the Admiralty think fit so to direct, and where such direction is given the same shall be specified in the ship's articles:

(1.) Every person borne on the books of any such hired vessel shall be subject to this Act:

(2.) Any offence committed by any such person shall be tried and punished as the like offence might be tried and punished if committed by any person in or belonging to Her Majesty's navy and borne on the books of any of Her Majesty's ships in commission:

(3.) Every such offender who is to be tried by court-martial shall be placed under all necessary restraint until he can be tried by court-martial:

(4.) On application made to the Lords of the Admiralty, or to the commander-in-chief, or senior officer of any of Her Majesty's ships or vessels of war abroad authorized to assemble and

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hold courts-martial, the Lords of the Admiralty, commander-in-chief, or senior officer (as the case may be) shall assemble and hold a court-martial for the trial of the offender:

(5.) The officer commanding every such hired vessel shall have the same power in respect of all other persons borne on the books thereof, or for the time being on board the same, as the officer commanding one of Her Majesty's ships has for the time being in respect of the officers and crew thereof or other persons on board the same:

(6.) The naval commander-in-chief and senior naval officer in Her Majesty's service shall have the same powers over the officers and crew of every such hired vessel as they have for the time being over the officers and crew of any of Her Majesty's ships.

Crews of ships lost or destroyed.

91. When any one of Her Majesty's ships shall be wrecked or lost or destroyed, or taken by the enemy, such ship shall, for the purposes of this Act, be deemed to remain in commission until her crew shall be regularly removed into some other of Her Majesty's ships of war, or until a court-martial shall have been held, pursuant to the custom of the navy in such cases, to inquire into the cause of the wreck, loss, destruction, or capture of the said ship.

All the officers and crew of lost ship may be tried by one court;

92. When no specific charge shall be made against any officer or seaman or other person in the fleet for or in respect or in consequence of such wreck, loss, destruction, or capture, it shall be lawful to try all the officers and crew or all the surviving officers and crew of any such ship, together, before one and the same court, and to call upon all or any of them when upon their trial to give evidence on oath or affirmation before the court touching any of the matters then under inquiry,

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but no officer or seaman or other person shall be obliged to give any evidence which may tend to criminate himself.

or by separate courts.

93. When deemed necessary by the Admiralty, or any officer authorized to order courts-martial, separate courts-martial shall be held for the trial of some one or more of such officers and crew for or in respect or in consequence of the wreck, loss, destruction, or capture of any such ship.

For subsequent offence, separate court.

94. For any offence or offences committed by any officer or seaman, or officers and seamen, after the wreck, loss, destruction, or capture of any such ship, a separate court-martial shall be held for the trial of such offender or offenders.

Pay of crews of ships lost or taken.

95. When any ship of Her Majesty shall be wrecked, lost, or otherwise destroyed, or taken by the enemy, if it shall appear by the sentence of a court-martial that the crew of such ship did, in the case of a ship wrecked or lost, do their utmost to save her or get her off, and in the case of a ship taken by the enemy did their utmost to defend themselves, and that they have, since the wreck, destruction, loss, or capture of such ship, behaved themselves well, and been obedient to their officers, then all the pay of such crews, or of such portions of such crews as have behaved themselves well, and been obedient to their officers, shall be continued until the time of their being discharged or removed into other ships of Her Majesty, or dying.

When ship of senior officer is lost he may dispose of officers and crew of lost ship.

96. If the ship of any officer ordered to command any two or more of Her Majesty's ships shall be wrecked, lost, or otherwise destroyed, such officer shall continue in the command of any ship or ships which at the time of his ship being wrecked, lost, or destroyed was or were under his command, and it shall be lawful for such officer to order the surviving officers and crew of the

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wrecked, lost, or destroyed ship to join any other ship under his command, or to distribute them among the other ships under his command, if more than one, and such officer shall, until he meets with some other officer senior to himself, have the same power and authority in all respects as if his ship had not been wrecked, lost, or destroyed.

Restriction on arrest of seamen, &c., for debt.

97. It shall not be lawful for any person to arrest any petty officer or seaman, non-commissioned officer of marines or marine, belonging to any ship of Her Majesty, by any warrant, process, or writ issued in any part of Her Majesty's dominions for any debt, unless the debt was contracted at a time when the debtor did not belong to Her Majesty's service, nor unless before the issuing of the warrant, process, or writ, the plaintiff in the suit or some person on his behalf has made an affidavit in the court out of which it is issued, that the debt justly due to the plaintiff (over and above all costs) was contracted at a time when the debtor did not belong to Her Majesty's service, nor unless a memorandum of such affidavit is marked on the back of the warrant, process, or writ.

Discharge from arrest.

98. If any petty officer or seaman, non-commissioned officer of marines or marine, is arrested in contravention of the provisions of the last foregoing section, the court out of which the warrant, process, or writ issues, or any judge thereof, may, on complaint by the party arrested, or by his superior officer, investigate the case on oath or otherwise, and if satisfied that the arrest was made in contravention of the provisions of the last foregoing section, may make an order for the immediate discharge of the party arrested, without fee, and may award to the complainant the costs of his complaint, to be taxed by the proper officer, for the recovery whereof he shall have the like remedy as the plaintiff in the suit would have on judgment being given in his favour, with costs.

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PART VII.

SAVING CLAUSE.

* * * * *

Nothing to take away prerogative of the Crown, or rights or powers of Admiralty.

100. Nothing in this Act shall take away, abridge, or control, further or otherwise than as expressly provided by this Act, any right, power, or prerogative of Her Majesty the Queen in right of Her Crown, or in right of Her Office of Admiralty or any right or power of the Admiralty.

Act not to supersede authority of ordinary courts.

101. Nothing in this Act contained shall be deemed or taken to supersede or affect the authority or power of any court or tribunal of ordinary civil or criminal jurisdiction or any officer thereof, in Her Majesty's dominions, in respect of any offence mentioned in this Act which may be punishable or cognizable by the common or statute law, or to prevent any person being proceeded against and punished in respect of any such offence otherwise than under this Act.

THE SCHEDULE.

Enactments repealed.

11 Geo. 4. & 1 Will. 4. c. 20.	An Act to amend and consolidate the laws relating to the pay of the Royal Navy . . . . Section eighty.	in part; namely.—
10 & 11 Vict. c. 62 .	An Act for the establishment of naval prisons, and for the prevention of desertion from Her Majesty's Navy . . . . Section eleven.	in part; namely.—
27 & 28 Vict. c. 119 .	The Naval Discipline Act, 1864.	
28 & 29 Vict. c. 115 .	The Naval Discipline Act Amendment Act, 1865.	

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MANUAL OF NAVAL LAW.

CHAPTER I.

ON THE EARLY STATE AND DISCIPLINE OF THE NAVY.

Origin of the Navy.

THE command of the navy has always been a prerogative of the Crown of England, though a Royal Navy fitted out from the revenues of the state, officered, and manned by the royal forces, was unknown in the early ages of the monarchy. Fleets, whether for aggression or defence, were raised on the requisition of the King by the inhabitants of the sea-port towns, and of these the Cinque Ports furnished by far the greater proportion both of seamen and ships;[1] the commanding officers were appointed by the King, and the feudal levies, who formed the military force of the realm, were embarked as soldiers, and did good service in the naval engagements of those days.[2]

Service of the Cinque Ports.

The terms of service, and the compensating immunities of the Cinque Ports were accurately defined by royal charter; the earliest known being those of Edward the Confessor and William the Conqueror. Their liberties were confirmed by the Great Charter, and the Charter of Edward the First, directed to the barons of the Cinque Ports for their good services done unto him by sea, declares, "that at each time that the King passeth over the sea, the ports ought to rig up fifty and seven ships, whereof every one to have twenty armed soldiers, and to maintain them at their own costes by the space of

[1] Seld. Mar. Clau. lib. ii. cap. 14; Holin. Chron. i. 339.
[2] Hakluyt, i. 19, 131; "Roll of the huge fleete of Edw. 3d, before Calice."

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fifteen days together"; if kept at sea longer, the charges fell on the King. "In requital for their faithfull and continuall services, the privileges of these ports be very great, considering either the honour and ease, or the freedom and exemption that the inhabitants have by reason of the same."[1]

The constant wars between France and England left them but little rest for the peaceful enjoyment of their exclusive liberties; yet the service was anything but unpopular, for booty as much as glory was the leading motive for the fight, and the coveted prize of victory.

Hubert de Burgh's naval action with the French, A.D. 1217.

The first great battle at sea between the two countries was fought by the men of the Cinque Ports in 1217, and is remarkable for that bold spirit which has ever moved the English sailor, however inferior in force, to close at once with the enemy. In that action Hubert de Burgh, the governor of Dover Castle, with forty ships great and small, of the Cinque Ports, attacked the French fleet of eighty great ships "at their first joining the Englishmen, with helpe of their crossebowes and archers, made great slaughter of their enemies, and grappling together, in the end bare themselves so manfullie, that they vanquished the whole French fleet, and obtained a famous victorie." The spoil and prey of the French ships "was verie rich, so that the Englishmen, being laden with riches and honour, upon their safe returne home, were received with great joy and gladnesse."[2]

Such was the prowess of the men of the Cinque Ports, their method of fighting, and the predatory character of international warfare in the middle ages.

Title of Lord High Admiral.

From the time of the Conquest, the Kings of England delegated the charge of guarding the coasts and commanding the fleets to officers, who in the reign of Henry I.

[1] Hakluyt, i. 21, 22.

[2] Rog. de Wend. iv. 28. This chronicler, in his account of the action, mentions that the English, having the wind in their backs, threw quicklime into the air, which was blown into the eyes of the French, and blinded them: Holin. Chron. iii. 347.

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were called Butescarles, a title afterwards changed to that of guardians of the ships, or guardians of the maritime shore.[1] In the reign of Edward I., instead of guardians or wardens they were termed admirals.[2] That monarch divided his shipping into three fleets, and in solemn manner created admirals of the navy towards the northern, the western, and the southern parts.[3] The office of Lord High Admiral was of later date, for the first commission to a single great officer was not issued until the time of Henry IV., when Thomas Beaufort, Duke of Exeter, was appointed to be admiral, not only of the fleets and navies, but of England and Ireland.[4]

The fleets of our neighbours and great rivals, the French, were governed under similar institutions. In early times naval jurisdiction was not limited to one functionary, the Admiral of France, but officers with corresponding powers were appointed to the great maritime provinces.[5] About 1300 the office was concentrated, and Amaurius, Viscount of Narbonne, was the first who bore the sole dignity of High Admiral of France.[6]

Functions of Lord High Admiral.

The functions of this great officer corresponded, and were alike extensive on either side of the Channel. The Lord High Admiral of England not only organized and governed the fleets raised for the service of the Crown, but held exclusive jurisdiction over all civil causes and criminal offences arising among seamen, whether belonging to the royal or merchant navy.[7] It is somewhat singular that this supreme office created in both countries about the same historic period, should have been upheld in all its integrity, though with many differences and changes of subordinate administration, both in England and France, until the seventeenth century; when

[1] Seld. Mar. Clau. lib. ii. cap. 14.
[2] Admiral: a word first used by the Crusaders, who took it from the Saracens, who termed their Generals Emirs, or Amiras. Valin, Comm. sur l'Ord. 1681, tit. *Amiral.*
[3] Seld. Mar. Clau. lib. ii. cap. 16, 307. [4] Ibid.
[5] Ibid. lib. ii. cap. 18. [6] Ibid. lib. i. cap. 18, 324.
[7] Mons. Nav. Tract. Church. iii. 317.

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the office of High Admiral was suppressed in France[1] and put into commission in England.[2] New regulations for the maintenance of discipline in the navy were introduced in England by the statute of 13 Charles II., and in France by the *ordonnances* of Louis XIV.

Prescription has preserved many of the usages for the punishment of crime in the navy, handed down from the earliest times, and enforced by a succession of admirals; some of these have been perpetuated by statute law, some, under the name of customs of the navy, are still applicable to minor offences.

Naval *ordonnances* of Rich. I., A.D. 1190.

The most ancient code of regulations is that of Richard I., when he marshalled his great fleet for the Holy Land. In a council of nobles he chose and appointed certain great officers to be justiciaries over the combined navy of England, Normandy, Brittany, and Poictou, and delivered his charter to them as follows:[3]—"Know all men that we, with the aid of upright counsellors have laid down these ordinances; whoever shall commit murder aboard ship shall be tied to the corpse and thrown into the sea; if a murder be committed on land, the murderer shall be tied to the corpse and buried alive; if any man be convicted of drawing a knife for the purpose of stabbing another, or shall have stabbed another so that blood shall flow, he shall lose a hand; if a man strike another with his hand, he shall be ducked three times in the sea; if any man defame, vilify, or swear at his fellow, he shall pay him as many ounces of silver as times that he has reviled him. If a robber be convicted of theft, boiling pitch shall be poured over his head, and a shower of feathers shaken over to mark him, and he shall be cast ashore on the first land at which the fleet shall touch. And all the crews were sworn to observe these constitutions, and to obey the commands of the justiciaries."

[1] Val. Comm. p. 124. [2] Encycl. Brit. tit. *Navy*.
[3] Rog. de Wend. vi. 24.

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Similar punishments for similar offences subsisted in the navy for many centuries afterwards, re-ordained on the fitting out of each successive expedition.

Origin of the Court of Admiralty.

A permanent Court of Justice (the origin of the present Court of Admiralty) was held under the authority of each High Admiral, for the trial of sea causes, both for life and goods,[1] and its jurisdiction in some cases defined by statute.[2] But as there was no standing navy during the thirteenth, fourteenth, fifteenth, and part of the sixteenth centuries, so was there no fixed code of naval law. Fleets were raised on emergencies for the public service, the greater part of the ships furnished by private enterprise, the remainder bought up for the occasion, and fitted out by the Crown.[3] When the expedition was ready, the Lord High Admiral, or the actual commander-in-chief, by authority delegated from him, issued specific instructions to the admirals and captains, for the punishment of offences and general maintenance of discipline, limited to the particular service. In this manner precedents grew up, and the same forms as applicable to similar circumstances were ordinarily reproduced. The summary powers granted to the commanding officers were very great; sprung from absolute authority, they were distinguished by its usual characteristic, extreme severity.

Ordinary regulations of naval discipline.

Growth of commerce in fifteenth and sixteenth centuries.

Introduction of artillery.

The growth of trade called for an increase in the size as well as number of ships. The dangers of the more distant voyages, the perils of war, and the numerous pirates, induced a corresponding armament.[4] Artillery was very generally adopted, and every ship beyond the burden of a coaster carried guns. The merchantman in those days was at once a trader and a privateer.

A description of the commercial navy to the close of the fifteenth century is a description of the navy of the state; for the latter was only called together for particular

[1] Mons. Nav. Tract. 285.
[2] Toml. Law Dict. tit. *Admiral.*
[3] Archæologia, xi. 157.
[4] Mons. Nav. Tract. 292.

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service on the breaking out of war, and consisted, as must be remembered, partly of ships furnished by the sea-ports, partly of ships bought or hired by the Crown. To embark a body of troops and cover their landing on the enemy's shore was the usual object of a naval expedition, so that an English fleet must be considered rather as a collection of armed transports than an array of line-of-battle ships. With similar armament, and ready alike for roving incursions on their neighbours' coast, the fleets of England and France often met in the narrow seas. The skill and seamanship of the captains were displayed in the manner of coming to close quarters with the enemy; to grapple and to board, was the aim of each; the battle was decided by the archers and men-at-arms;[1] and could scarcely be called a naval engagement according to the present system of tactics.

Characteristics of naval engagements in fifteenth century.

Henry VII., guided by his ruling passion, avarice, promoted manufactures and commerce with unremitting zeal.[2] Prompted by that strange mixture of sagacity, prudence, and penuriousness which marked his character, he seems to have devised the project of a standing navy, as well to avoid the inconvenience and expense of raising and hiring ships on sudden conjunctures, as to provide a permanent protection for the extending commerce of the country.[3]

Encouragement of shipping by Henry VII.

The King, as vigorous in execution as in conception, forwarded this measure on a princely scale, by ordering the construction of the "Great Harry" at a cost of £1,400,[4] a wonderful work for the shipwrights of that day.[5] For this vessel had three masts, and two decks, and was of dimensions formerly unknown in the service.[6] She was, properly speaking, the first man-of-war in the English navy. Other ships were quickly fitted

[1] Archæologia, xi. 169.
[2] Lord Bacon's "Life of Henry VII." 636; Stowe's Chron. 485.
[3] Campb. Adm. i. 251.
[4] Stowe's Chron. 484—the same amount that the King expended in building the chapel at Westminster.
[5] James's Nav. Hist. i. 2. [6] Hume, iii. 427.

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out, and when these were not employed or likely to be employed by the state, the King, to obtain some return for his expenditure, turned the tables on the traders, and instead of hiring himself, let his vessels on hire to the merchants.[1]

Henry VIII., often at war with the Continental powers, and at the same time desirous of extending the national commerce, then much increased by the discovery of the East and West Indies, was bent on obtaining a permanent strength at sea. To carry this plan into effect, he established those cradles of the British navy, the royal dockyards of Woolwich, Deptford, and Chatham; and founded that noble marine guild, the fraternity of the Trinity. With a right appreciation of the change of weapons and manner of fighting, he employed Italian shipwrights to introduce the latest improvements, and encouraged his own people to build strong ships of war to carry great ordnance.[2]

Royal dockyards established by Henry VIII.

With the rapid strides made during the sixteenth century in the art of ship-building and science of navigation, there was no corresponding change in the government of the fleet, and administration of naval affairs. These were still under the direction of the Lord High Admiral; and remarkable as was the efficiency of the royal officers, they were far surpassed by the boldness and enterprise of private adventurers. War with Spain was the signal that drew together all the gallant and ambitious spirits of the time. Descents on the coast of Spain, expeditions to intercept and capture the Spanish galleons, attacks on the South American settlements, were among the projects designed and carried out by associations of individuals.[3] The commanders, many of them men of birth and wealth, staked their fortunes on the venture; and they were supported by subscriptions from the great merchants in London. Drake, Hawkins,

Adventurous spirit of the Buccaneers in Queen Elizabeth's reign.

[1] Camph. Adm. i. 253.
[2] Archæologia, xi. 158.
[3] Hakluyt, ii.; Mons. Nav. Tract. *passim.*

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Frobisher, and Raleigh, made the name of the English sailor a word of fear throughout the Spanish Main. Queen Elizabeth knighted Captain Drake on board his own ship on his return from his famous voyage round the world, and thereby stamped her approval of the reprisals made on the American coasts, and the plunder of Spanish commerce, at a time when the two countries were nominally at peace.[1] Though the English inveighed against the faithlessness of the Spaniards, yet it may well be doubted whether maritime glory was not dearly purchased by the breach of treaties and lawlessness of the buccaneers.

All these great captains[2] joined the royal forces, and distinguished themselves under the command of the Lord High Admiral, Lord Howard of Effingham, in the memorable running fight with the Invincible Armada, on its passage up the English Channel. Though the most energetic efforts had been made in the royal dockyards to meet the threatened descent of the Armada, the Queen's men-of-war were far inferior in number to those equipped by private adventurers and the vessels hired of the merchants. This disproportion is most prominent throughout the naval annals of her reign.

The Spanish Armada, A.D. 1588.

A great expedition was planned in 1596, for the capture of the city and destruction of the Spanish fleet in the port of Cadiz. An imposing force, military as well as naval, was assembled at Plymouth, under the combined command of the Earl of Essex and the Lord High Admiral; of no less than 126 men-of-war, only seventeen were Queen's ships.[3] The description of the chronicler gives an exact picture of the character and composition of the force, and some curious details of the discipline described and enforced by the commanders.

Martial law in the Cadiz fleet, A.D. 1596.

"After that the two most noble and renowned Lords General, the Lord Robert Earle of Essex, and the Lord Charles Howard, Lord High Admiral of England, were come into Plymouth, being there accompanied with

[1] Hume, v. 238. [2] Mons. Nav. Tract. [3] Hakluyt, ii. 19.

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divers other noble Peeres; it pleased them there to make their abode for the time of that moneth, as well for the new furnishing and revictualling of her Majesties Royall Navie, as also for the expecting of some other ships, which were to come from divers places of the realme and were as yet wanting. All the time of this their abode there, there was a most zealous and diligent care had for the holy service of God, dayly and reverently to be frequented, and also for other good and civill orders of militarie discipline to be observed to the exceeding great comfort and rejoicing of all the hearts of the godly and well disposed.

"And for that it might the better appeare that there was small hope of pardon to be expected of the offenders if they did at any time neglect their duties, about due observation of matters of importance: their orders, lawes, and decrees being once published: about the eighth or ninth of the same month, there were two offenders executed a little without the towne, in a very fayre pleasant greene called the Ho: the one for beginning a mutiny in his company, the other for running away from his colours.

"And about the same time in the Dutch regiment, another for murthering of one of his companions about a quarrell betweene themselves, rising as it was supposed upon their drinke, was, by order of martiall lawe presently tyed to the partie so murthered, and forthwith both of them so cast into the sea.

"Moreover, about the 28th of the same moneth a certaine lieutenant (whose name I will forbeare) was, by sound of drummer, publikely in all the streetes disgraced, or rather after a sort degraded and cashiered for bearing any further office at that time, for the taking of money by way of corruption of certaine prest soldiers in the countrey and for placing of others in their roomes, more unfit for service, and of lesser sufficiency and abilitie. This severe executing of justice at the very first, did

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breed such a deepe terror in the hearts of the whole armie, that it seemed to cut off all occasion of the like disorder for ever afterwards to be attempted."

The reign of Elizabeth is a turning point in the history of the English navy; the Queen at the time of her death was mistress of forty-two ships of war, a considerable number, though many of them very small; full one half were under 400 tons: two only of 1,000, and six of 800 tons and upwards; they carried from thirty-two to forty guns each, and a complement of 400 to 500 men (of which about one-fifth were classified as soldiers); the whole number of the guns belonging to the fleet only amounted to 774.[1]

Force of the Royal Navy, A.D. 1603.

Comparative size of the Spanish ships.

A.D. 1591.

The Spanish ships at the same era were of much greater size, far larger than any that had ever before been used in Europe.[2] Sir Walter Raleigh describes the "San-Philip," a galleon, that either sheered off or foundered after a most spirited action at the Azores with Sir Richard Grenvill in the "Revenge," as "a huge and high carged ship, being of a thousand and five hundreth tuns, carrying three tire of ordnance on a side, and eleven pieces in every tire; she shot eight forth right out of her chase, besides those of her stern ports."[3]

These mighty vessels were so ill-framed and unwieldy, and sailed so badly as to be quite unmanageable in stormy weather; thus the English captains usually obtained the advantage in attack, and were never dismayed at the tremendous appearance of their huge antagonists; still the true difference in fight lay not in the shape and dimensions of the ships, but in the courage and resolution of the seamen.[4]

Peace with Spain caused a lull in naval affairs, but English commerce at the same time suffered severely from the ravages of the Algerine and Barbary pirates.[5]

Prevalence of piracy.

[1] Mons. Nav. Tract. 188. [2] Hume, v. 351. [3] Hakluyt, ii. 665.

[4] "I had rather a reasonable ship of the King of Spain's, manned with Englishmen, than a very good ship of her Majesty's manned with Spanniards."—Mons. Nav. Tract. 312.

[5] Mons. Nav. Tract. 292; Dixon's "Life of Blake," 12.

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Yet the merchants were not discouraged, they built stouter ships and armed them heavily: trade was opened in many new quarters, and the merchant fleet so increased, that early in the seventeenth century there were no less than 100 sail, furnished with ordnance, belonging to the port of London alone.[1]

Though few men-of-war were built,[2] and no stirring action is to be found in the annals of King James's reign, yet it is very remarkable for the important change which was then effected in the political constitution of the navy. To cover the incapacity of his favourite, Buckingham, whom he advanced to the dignity of Lord High Admiral, the King nominated a council of men of rank, of great naval experience, without whose advice no affairs of importance were to be undertaken.[3] This is the origin of the Board of Admiralty.

The Marquis of Buckingham appointed Lord High Admiral assisted by a council, A.D. 1619.

The revolution in naval tactics, occasioned by the employment of artillery, had been more gradual than might have been anticipated from the introduction of so novel and destructive an element as gunpowder. The English were loth to throw aside their national weapon, the bow: and during the period of transition, men-of-war were often equipped with a very miscellaneous armament. At the beginning of the seventeenth century the modern system of warfare had become general, and the supplies required for the new order of things are most minutely described in the Admiralty instructions.[4]

Change in naval tactics in consequence of the use of artillery.

Great attention was paid to naval affairs in the early part of the reign of Charles I., and many ships were built and added to the Royal Navy; the two fleets that were

State of the navy, A.D. 1635.

[1] Ibid. 292.

[2] There was one great exception, "The Prince," of 1,400 tons and sixty-four guns, built at Woolwich in 1610 by Mr. Pett, M.A., of Emmanuel College, Cambridge: Campb. Adm. i. 484.

[3] Ibid. i. 401; Rushworth, i. 379.

[4] Instructions given by George, Marquis of Buckingham, Lord High Admiral, for the direction and government of her Majesty's navy: Admir. Rec. Naval Coll. i. 326. These instructions are of the fullest description, comprising every detail of administration, the duties of the surveyor, treasurer, comptroller, clerk of the cheque, principal masters, and directions with respect to men, materials, victualling, &c.

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fitted out in 1635, in support of the King's claim to the sovereignty of the narrow seas, consisted of forty sail, under the Earl of Lindsay, and 120 under the Earl of Essex.[1]

The "Sovereign of the Seas" built, A.D. 1637.

In 1637, was launched the "Sovereign of the Seas," a ship designed by Pett and built at Woolwich. "She was of 1,637 tons, with a length of keel of 128 feet, main breadth forty-eight feet, length from stem to stern 232 feet; bore five lanthorns, the biggest of which would hold ten persons upright: had three flush decks, a forecastle, half-deck, quarter-deck, and round-house. Her lower tier had thirty ports, middle tier thirty ports, third tier twenty-six ports, forecastle twelve ports, half-deck fourteen ports; thirteen or fourteen ports more within board, besides ten pieces of chase ordnance forwards, and ten right aft, and many loop-holes in the cabbins for musquet-shot."[2]

Office of High Admiral put into commission A.D. 1632.

A few years after Buckingham's death the office of High Admiral was first put in commission, all the great officers of state being named as commissioners.[3]

With this great change in the organization of a Board of Admiralty, there was no corresponding alteration in the administration at sea; the admiral in command, as before, made regulations for the punishment of crime, and enforcement of discipline aboard his fleet. The jurisdiction in this respect reserved by the admiral to himself, and the summary powers delegated to the officers commanding under him, are well defined in the instructions issued by Admiral the Earl of Lindsay to the admirals and captains of his fleet.[4]

Earl of Lindsay's instructions to the officers of his fleet, A.D. 1635.

"1st. In your own particular, you are to have special care that you perform your duty faithfully and with diligence; and if any seaman, or other in your ship shall raise faction, tumult, or conspiracy, or commit manslaughter, or murder, or shall quarrel, or fight, or draw blood, or weapon to that end, or commit theft,

[1] Campb. Adm. i. 548.
[2] Ibid. i. 559.
[3] Encycl. Brit. tit. *Admiral.*
[4] Mons. Nav. Tract. 296.

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or other heinous capital offence, you shall cause precise information to be brought to me thereof, that I may inflict condign punishment upon each offender according to the condition of his crime.

"2ndly. If any under your command in that ship shall be a common swearer, blasphemer, railer, drunkard, pilferer, or sleep at his watch, or make a noise, and not betake himself to his place of rest after the watch is set, or shall not keep his cabin cleanly, or be discontented with his proportion of victuals, or shall spoil or waste them, or any other necessary provisions for the ship, or shall commit any insolency or disorder, fitting by you to be corrected, you are to punish them according to the order and custom of the sea."

These summary punishments according to the custom of the sea, afford a curious instance of the quaint and barbarous usages of the period. They are as follow:—

"A captain may punish according to the offence committed (viz.), putting one in the billbows during pleasure; keep them fasting; duck them at the yard-arm, or haul them from yard-arm to yard-arm under the ship's keel; or make them fast to the capstan, and whip them there; or at the capstan or mainmast hang weights about their necks till their hearts and backs be ready to break, or to gagg or scrape their tongues for blasphemy or swearing. This will tame the most rude and savage people in the world."[1]

The naval force of the nation at this era no longer consisted of fleets hastily collected at the outbreak of war: a Royal Navy had become a permanent institution of the kingdom.

Navy managed by a Committee of Parliament.

During the Commonwealth a Committee of Parliament managed the affairs of the Admiralty, and kept the fleet in good order and well paid.[2]

Ordinance for the government

The leaders of the Long Parliament, always distinguished for their administrative ability, framed a system

[1] Mons. Nav. Tract. 293. [2] Encycl. Brit. tit. *Admiral*; Campb. ii. 56.

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of the navy, A.D. 1645.

of laws for the government of the navy. The provisions of this measure appear to have been carefully considered and discussed, as it came down from the House of Lords in February, 1644,[1] and did not pass the Commons until April, 1645.[2] It was entitled[3] "An ordinance and articles concerning martial law for the government of the navy."

By this enactment, the rules of discipline were fixed, offences defined, trial by councils of war enjoined, and punishments directed according to the nature of the offence, and the known orders and customs of the seas.[4]

Instructions of the admirals and generals of the fleet for councils of war, A.D. 1653.

Additional powers were given to the admirals and generals of the fleet by ordinances passed in 1648 and 1653.[5] Under the authority of these Acts instructions for the trial of offenders by councils of war were issued by Robert Blake, George Monck, John Disbrow, and William Penn, admirals and generals of the fleet.[6]

This is the first notice of the form and constitution of a naval court-martial to be found in English history. Here is a perfect system, with all the machinery for the fair and speedy trial of offences, based on the broadest principles, and complete in all its details. The constitution of the court is founded on the great fundamental law of English liberty—the trial of a man by his peers. Captains and commanders of ships are to be tried by a general council of war, consisting of the flag commander, and the commanders of the ships of his division. Subordinate officers and men are to be tried by a ship court-martial, composed of the officers and warrant-officers of the ship. These provisions ensure an assembly of upright and sensible judges of every rank and degree;

Advantages of a ship court-martial.

[1] Journals of House of Lords, vii. 255. [2] Journ. Comm. iv. 118.
[3] Lords' Journ. vii. 255. Mr. Thring was unable to discover a copy of this ordinance.
[4] Referred to in the "Instructions of the Committee of Lords and Commons for the Admiralty and Cinque Ports:" Adm. Rec. Naval Coll. i., A.D. 1647. [5] Journ. Comm. vi. 150, vii. 340.
[6] Adm. Rec. Naval Coll. i. 366. The collection of MSS. from whence the Instructions are extracted is stated to have been found in the closet of Admiral Penn, and presented by his son to the King A.D. 1680. See the "Instructions" in full, p. xix.

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for the warrant-officers represent the best class of seamen. Such a tribunal inspires confidence in the men, whilst it is well calculated for the impartial investigation of facts, and the protection of the interests of all ranks in the service.

The amplest safeguards are provided against unjust or oppressive sentences by the regulation which requires the confirmation of the flag commander, where the commission is to be forfeited, and that of the generals of the fleet, where life or limb is in peril.[1]

State of the navy under the Protector.

In Cromwell's time the fleet was increased to 150 sail, of which more than one-third were two-deckers; but it soon declined under the short and feeble administration of his son.[2]

The government and administration of the navy at the Restoration, A.D. 1660.

At the Restoration, "the government and command of all forces by sea and land were declared by Act of Parliament to be, and ever to have been, the undoubted right of his Majesty and his royal predecessors the Kings and Queens of England."[3] In the exercise of this royal prerogative, the King appointed the Duke of York to the office of Lord High Admiral. The Commons were liberal in their grants of supplies;[4] and during the early years of Charles II., by the advice and assistance of Pepys, the ablest man at the Admiralty, great progress was made in the equipment and increase of the fleet;[5] what it became at the close of the same reign—the corruption and venality of the officials, the decay of the shipping, the insolent incapacity of the aristocratic captains—have all been most forcibly sketched by Macaulay.[6]

The Duke of York appointed High Admiral.

It is not proposed to trace the material progress of the fleet any further, for a time has been reached that marks an era in the constitutional history of the navy. The naval question was consistently dealt with by the legislature, and a framework of administration put together

Articles of war, A.D. 1661.

[1] See Napier on Courts-Martial.
[2] Encycl. Brit. tit. *Navy*.
[3] 13 & 14 Car. 2, c. 3.
[4] Hallam, Const. Hist. ii. 482.
[5] Encycl. Brit. tit. *Navy*.
[6] Macaulay, i. 290—305.

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substantially in the same form as that in which it is now found; a code of laws[1] was enacted for the enforcement of discipline among the crews in actual service aboard men-of-war when at sea, or in the main stream of great rivers; powers were inserted for the trial of offenders by courts-martial; supplies, when voted, were appropriated by parliament to limited purposes;[2] commissioners were appointed to the Admiralty, and their authority, some few years later, defined and confirmed by statute.[3] It only remains to note the origin of these enactments, and the subsequent changes, whether of administration or law; 1st, as affecting the Board of Admiralty; 2ndly, as bearing on the naval code.

Naval administration.

In 1673 the Duke of York resigned the office of Lord High Admiral. The Admiralty was again entrusted to commissioners, with more extensive powers than before.[4]

Resignation of the Duke of York.

Board of Admiralty constituted.

We are told by Pepys, "that they had taken upon themselves the performance of that branch of the admiral's task which his Majesty was pleased for the ease of his last commissioners, to reserve the trouble of to himself, viz., the issuing of all sailing instructions to his fleet and ships: his Majesty having, at the instance of these gentlemen, put that part also into their hands, together with the granting of all offices in the navy, in the same manner as it had at any time been exercised by the Lords Admiral of England."

The Board continued in the exercise of the same powers until after the Revolution: but in 1690, some doubts having arisen whether certain authorities appertaining to the office of Lord High Admiral belonged of right to the commissioners for the time being, a statute was passed, vesting all such rights in the commissioners to all intents and purposes, as if the said commissioners were Lord High Admiral of England.[5]

[1] 13 Car. 2. c. 9.
[2] Hallam, Const. Hist. ii. 482.
[3] 2 W. & M. Sess. 2, c. 2.
[4] Letter to the Duke of York; Pepys' Diary, iv. 213.
[5] 2 W. & M. c. 2.

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Prince George of Denmark appointed High Admiral.

In 1707 H.R.H. Prince George of Denmark was appointed Lord High Admiral of England, with a council to assist him.[1]

A Board of Admiralty again appointed.

In 1708 the office of Lord High Admiral was again put into commission; since which period it continued to be executed by Lords Commissioners of the Admiralty until 1827, when H.R.H. the Duke of Clarence was appointed Lord High Admiral, with a council of four members to assist him, and the powers and duties of the office were defined and confirmed, without any material alteration, by Act of Parliament.[2] In 1828 it was again put into commission, and so it still remains.

Duke of Clarence appointed High Admiral.

Ordinary composition of the Board of Admiralty.

The Board usually consists of six members, the First Lord, generally a civilian, four naval lords, and a sixth, a civilian, who is ordinarily a member of the House of Commons. At different periods within these last forty years, there have been a greater proportion of civilians, members of Parliament, on the Board.[3] Formerly the seats at the Board were taken according to the order in which the names stood in the patent; but Lord Grey, when in office, adopted a new and more reasonable rule, which gave the First Lord power to settle the precedence, and thereby to ensure the position of the principal or advising naval lord next himself, whatever his relative rank might be.[4]

Jurisdiction of the Court of Admiralty.

It is to be observed, that in tracing the authority and duties of the Lord High Admiral, little notice has been taken of the Court of Admiralty, though its powers were derived directly from the Lord High Admiral, who had cognizance over all sea causes, both for life and goods;[5] practically, the civil jurisdiction of this Court has, from very early times, been confined to maritime and prize causes,[6] whilst criminal offences on the high seas have, by a succession of statutes,[7] been tried under com-

[1] Encycl. Brit. tit. *Navy*.
[2] 7 & 8 G. 4, c. 65.
[3] Admir. Rec.
[4] Barrow's "Life of Anson," 196.
[5] Mons. Nav. Tract. 283.
[6] Steph. Bl. iii. 725; Wynne's "Life of Sir L. Jenkins," i. 76, 90.
[7] 28 H. 8, c. 15; 9 G. 4, c. 31.

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missions, usually directed to the judge of the Admiralty Court and two judges of the common law courts, and latterly delegated altogether to the ordinary courts of assize.[1] But the Court of Admiralty has never exercised any control over the government or discipline of the navy. Thus at the time when the Admiralty was permanently put into commission, the functions of the Court on the one hand were already well ascertained, and the discipline of the navy on the other provided for by the then recently enacted naval code. These facts will, in great measure, account for the remarkable difference between the patents by which the office of Lord High Admiral, and that of the Admiralty are constituted: for that of the High Admiral[2] mentions very little of the military part of his office, but chiefly details his judicial duties as a magistrate; whilst, on the contrary, the patent to the Lords Commissioners of the Admiralty[3] is very particular in directing them to govern the affairs of the navy, and is almost wholly silent as to their judicial powers.

Patents of Lord High Admiral and Commissioners of Admiralty.

Reasons for the enactment of a naval code, A.D. 1661.

Little is known of the immediate steps which led to the enactment of the first naval code or "Articles of War," soon after the Restoration in 1661; though the law was drawn up by a great admiral, Montague, approved by the Lord Chancellor Hyde, and several other eminent men of the King's Council, before it was submitted to either House of Parliament.[4] The Act originated with the lords, and was referred to a committee of which the Duke of York was the head.[5] It is not very difficult to conjecture the predominating reasons for its introduction, if we consider the state of the law and condition of the navy at that period. The regulations of each admiral had only applied, as we have seen, to the discipline of the fleet under his immediate

[1] 7 & 8 Vict. c. 2.
[2] For Patent of Lord High Admiral, see Seld. Mar. Clau. c. 16; Patent of Prince George of Denmark, Byng's MS. Adm. Rec.
[3] For Patent of Lords Commissioners of the Admiralty, see 2 East, 515 (*n*).
[4] Parl. Hist. 1749; McArthur, i. 367.
[5] Lords' Journ. 1661, ii. 305.

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command; the powers of the Court of Chivalry, from which courts-martial are supposed to have originated, had long since been circumscribed, and fallen almost into entire disuse.[1] The Petition of Right had declared commissions for the trial of soldiers and *mariners* dispersed into divers counties of the realm, according to the practice of martial law as is used in armies in times of war, to be wholly and directly contrary to the laws and statutes of the realm.[2] The feudal system was already abolished.[3] The common law knew nothing of courts-martial and made no distinction in time of peace between soldiers and mariners in the service of the Crown and any other subject.[4] At the same time the establishment of the navy, based on the firmest grounds, had become permanent,[5] whilst the army was reduced to three regiments subsisting only from year to year at the pleasure of the House of Commons.[6] True, the navy had been governed by the Commonwealth under a well-organized system of laws; but the statesmen of Charles II. altogether ignored the acts of the interregnum, and blotted them out of the statute-book; yet so admirable an example could not have been lost sight of by such able administrators as the Duke of York and Admiral Montague. Though history is silent, it is safe to conclude that the ordinances of the Commonwealth formed the groundwork of the great naval law of the Restoration. An enduring code was necessary to maintain authority in the fleet, for the parliamentarian acts were abrogated, and the old laws of the monarchy were utterly inefficient to uphold discipline. Such was the immediate necessity that originated the articles of war.[7]

Distinction between martial and military law.

Martial law, or the law of war dependent on the absolute power and pleasure of the King, had often been proclaimed in England in troublous times, the jurisdiction of the ordinary courts suspended, and the judicial power over all classes of the people delegated to the military authorities;

[1] McArthur, i. 19. [2] 3 Car. 1, c. 1. [3] 13 Car. 2, c. 24.
[4] 1 Bl. Com. 412. [5] 1 Bl. Com. 412. [6] Hallam, Const. Hist. ii. 426.
[7] 13 Car. 2, c. 9.

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but martial law was contrary to the constitution, and of no authority in time of peace; it was, says Sir Matthew Hale, built upon no settled principles, entirely arbitrary in its decisions; in truth and reality no law, but something indulged, rather than allowed as a law.[1] Military law, on the other hand, is the creation of the legislature—its object, to institute a court invested with authority to try those who belong to the army or navy, as the case may be, for the offences designated, and within the precise limits specified by Act of Parliament.[2]

Court-martial on the Earl of Torrington, A.D. 1690.

The first amendment of the naval code was occasioned by a question of construction, when charges were brought against Lord Torrington for his conduct as Commander of the Fleet in the disastrous and disgraceful battle off Beachy Head. A technical difficulty had arisen on the mode of bringing him to trial. There was no Lord High Admiral, and some jurists had doubted whether the Commissioners of the Admiralty were competent to order a court-martial. The earl, and his friends for him, claimed the right of trial by his peers. The King was resolved that it should be by a court-martial.[3] To remove all doubt, an Act was passed which confirmed in the fullest manner the authority of the Commissioners of the Admiralty, and, in addition, contained a clause that all

[1] Blackburn, J., thus comments upon martial law in his charge to the grand jury in *R.* v. *Eyre*, Finlason, 75. "Since the time of Charles 1st, there has never been any case in which it has become necessary to consider judicially what were the limits of the powers of the prerogative in time of war. Thus much I think, I may safely say, that in time of peace the Crown has no such power. Lord Hale says, 'the Crown by its prerogative has the power of punishing rebels during the rebellion, but not after.' And again in the Pleas of the Crown he puts it, after citing the case of the Earl of Lancaster, 'from this record it appears that in time of peace the Crown cannot enforce martial law;' and further that '*regularly* when the King's Courts are open, it is a time of peace in judgment of laws.' He is very cautious, you will observe, and puts it there in this way, and that is certainly the opinion I have come to myself, that it has not been quite settled what is the Crown prerogative in such cases, and what not. But I think this much is settled, that it is by no means that unbounded, wild, and tyrannical prerogative which some persons have been lately saying that it is. It must, if it exists at all, be strictly limited to necessity."

[2] 1 Bl. Com. 412; Toml. Law Dict. *Mart. Law; Grant* v. *Sir C. Gould*, 2 H. Bl. 99.

[3] McArthur, i. 110.

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members of courts-martial should take an oath that they would duly administer justice.[1]

Many very material questions affecting the jurisdiction of the Admiralty, the amendment of the naval code, and the internal administration of the navy, were raised and determined in the reign of George II., during the period that Admiral, afterwards Lord, Anson was the guiding and ablest member of the board.

Lord Anson at the Admiralty.

"In 1745, the nation was clamorous against the Admirals Matthews and Lestock, for their failure in the partial action with the French fleet off Toulon. An inquiry was moved for in the House of Commons; and, in consequence, the House came to the resolution of sending up an address to his Majesty, with a prayer that he would direct a court-martial to be held in the most speedy and solemn manner to inquire into the conduct of the officers engaged. To this his Majesty returned a gracious reply, and issued his commands to the Board of Admiralty to order a court-martial to be assembled accordingly. This encroachment on the part of the Crown, striking at once at the authority of the Admiralty, in whom alone the power was vested, was, nevertheless, complied with. But Admiral Anson waited on the Duke of Newcastle with a remonstrance on the injurious consequences which must result to the service should so unusual a stretch of prerogative be brought into a precedent. The King and his minister could not but see at once how necessary it was to maintain inviolate the jurisdiction of the Admiralty, as by law established, and by royal patent confirmed; and no instance of such interference has ever since occurred."[2] The result of this trial is well known. Admiral Matthews was cashiered; Admiral Lestock acquitted; and eleven captains tried, of whom two only were acquitted.

Court-martial on Admirals Matthews and Lestock, A.D. 1745.

During the next few years several important points of administration were decided.

Naval uniform established.

[1] 2 W. & M. Sess. 2, c. 2.

[2] Barrow's "Life of Anson," 125.

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About 1747, the Board of Admiralty determined on giving an established uniform to naval officers.[1]

In 1748, the comparative rank of officers in the army and navy was settled by order in council, and it still continues without material alteration.[2]

Corps of Royal Marines formed.

In the same year, the First Lord of the Admiralty, Lord Sandwich, brought forward a most careful suggestion for the establishment of a permanent body of marines in place of the soldiers with whom the fleet had hitherto been supplied. This scheme was soon afterwards carried out by Lord Anson, and that excellent corps, the Royal Marines, raised.[3]

Crews of wrecked ships placed under "the Articles of War," A.D. 1748.

In 1748, Anson, mindful of the bad and mutinous conduct of the shipwrecked seamen of the "Wager"[4] (a vessel which had formed part of his squadron in the early part of his famous voyage round the world), procured an Act "for extending the discipline of the navy to the crews of his Majesty's ships wrecked, lost, or taken, and for continuing to them their wages upon certain conditions."[5]

Consolidation of naval code, A.D. 1749.

In 1749, "the laws relating to the government of his Majesty's ships, vessels, and forces by sea"[6] were consolidated: the principal amendments introduced were the administration of an oath of secrecy to members of courts-martial; an extension of jurisdiction in the case of spies, as well as of offences committed by crews of ships of war on shore in any place out of his Majesty's dominions.

An attempt was made to pass a clause subjecting half-pay officers to courts-martial; but a strong spirit of opposition was raised against it out of doors. A petition, signed by three admirals and forty-seven captains, was presented to Parliament; and after a protracted debate in the House of Commons, the clause was withdrawn by the minister, Mr. Pelham.[7]

Draconic severity of the naval code.

This Act, embodying all the provisions of the statute of Charles, has, with a few alterations (to be noticed

[1] Barrow's "Life of Anson," 150. [2] Ibid. 193. [3] Ibid. 210.
[4] Ibid. 95. [5] 21 G. 2, c. 11. [6] 22 G. 2, c. 33. [7] McArthur, i. 188.

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hereafter), constituted the naval code up to our own time. It has been said, with great justice, that the penalty of death recurs in it as often as the curses in the Commination Service; of thirty-six articles of war, ten award the punishment of death, subject to no qualification or mitigation; twelve, "death, or such other punishment" as the court-martial shall deem the offender to deserve.[1]

Case of Admiral Byng.

A striking example of the sanguinary severity of these laws soon afterwards occurred—one of lasting disgrace in the memory of the navy—the well-known fate of Admiral Byng in 1756.[2]

Court-martial.

After an imprisonment of unnecessary severity, and a tedious trial, the court-martial found Byng guilty of the lesser charge "of not having done his utmost to take and destroy the ships of the enemy"[3] but acquitted the admiral of any imputation of cowardice, or backwardness during the action. Under the twelfth article of war there was no discretionary punishment, no alternative but a sentence of death. The members of the Court deprecated the inflexibility of the law, and through the Admiralty, prayed for the clemency of the Crown; the only result being that the opinion of the judges was taken on the technical legality of the sentence, but the prerogative of mercy was withheld.

Execution.

On the 17th of March, 1757, Admiral Byng was shot on the quarter-deck of the "Monarque," in Portsmouth harbour.[4] He met his doom with unflinching firmness, and died a sacrifice to an ignorant and misguided outburst of popular indignation.[5] Personally brave, there had been no reflection on his courage. Inferior in energy and capacity, he fell a victim to errors of judgment and dread of responsibility.[6]

Character of Admiral Byng.

Reflections on the finding

It may well be doubted whether the finding of the

[1] Barrow's "Life of Anson," 220.

[2] The Duke of Newcastle blurted out, to a deputation from the City: "Oh, indeed, he shall be tried immediately; he shall be hanged directly." —Lord Mahon's Hist. Eng. iv. 107.

[3] This charge was founded on 22 G. 2, c. 33, art. 12.

[4] Parl. Hist., 1757, 825. [5] Ibid., 1757, 823. [6] Lord Mahon, iv. 144.

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of the court-martial.

court-martial was right, in impliedly classing error of judgment under the head of negligence;[1] for there was no proof of such dereliction of duty or unskilfulness as an officer, as amounted to criminal misconduct, and no question of the perfect honesty of Byng's motives.

"The sure result of the application of disproportionate punishment to an involuntary fault has followed; public sympathy has been enlisted on the side of the sufferer;[2] condemnation changed into pity, and the memory of an ordinary officer enshrined with the fame of a hero and a martyr."[3]

Mitigation of the twelfth article of war, A.D. 1779.

"Naval officers at the time of Byng's execution, were strongly impressed with the cruelty of the sentence; Admiral West loudly demanded a revision of the twelfth article; Mr. Pitt reprobated the twelfth article for its unjust severity; he called it the mortal article; yet it had its defenders in the House of Commons, and not until twenty-two years afterwards were the twelfth and thirteenth articles mitigated by the addition after the word 'death,' of the words 'or to inflict such other punishment as the nature and degree of the offence shall be found to deserve.'"[4] By the same Act[5] the provision of 22 Geo. II. c. 33, s. 15, "that no member of a court-martial should go ashore, or leave the ship in which the court were assembled until sentence was given," was repealed. The confinement and restraint enforced under this enactment, had been felt so severely at Admiral Keppel's trial in 1779, that the members of the court memorialized the Admiralty for the removal of an oppression so much complained of; the complaint was admitted to be well founded, and this remedial measure soon afterwards passed.[6] The law requiring naval courts-martial to hold their sittings on board ship, still continues in force.[7]

[1] Remonstrance of Admiral Forbes, one of the Lords of the Admiralty. McArthur, ii., Append.

[2] Voltaire's bitter sarcasm on Byng's fate is universally known: "Dans ce pays-ci, il est bon de tuer de temps en temps un Amiral pour encourager les autres."

[3] Lord Mahon, iv. 145. [4] Barrow's "Life of Anson," 272.

[5] 19 G. 3, c. 17. [6] McArthur, i. 262. [7] N. D. Act, s. 59.

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Mutiny at the Nore.

In 1797 two Acts were passed with most extensive powers for the suppression of mutiny, at a time when the mouth of the Thames was blockaded by our own fleet.[1] The occasion was exceptional; the duration of the statutes accordingly limited; and a reasonable hope may be entertained that no such untoward disaster may again occur in the navy.

Jurisdiction of the naval code.

Sprung from these sources, and moulded into the shape which has been here sketched, this code of law for the regulation of the navy has been handed down to our own times; it forms one branch of military law. In constitutional history it has been distinguished for its permanency—an enduring code for a standing navy—for no danger to the liberty of the subject has ever been apprehended from the fleet: all the principal crimes have been accurately designated by statute; the only undefined powers being for the punishment of minor offences according to the laws and customs in such cases used at sea.[2] Marine and land forces, when on board ships of war, are subject to its jurisdiction under the Army Act, and an Order in Council, February 6th, 1882.

Jurisdiction of the Mutiny Acts.

The other branch of military law embraces all the royal land forces, and marines, when serving on shore; it is created by the Army Act (44 & 45 Vict. c. 58), which is itself brought into operation annually by another Act of Parliament, which embodies a continual protest on the part of the Parliament against a standing army, thus securing the constitutional principle of the control of Parliament over the discipline requisite for the government of the army. [M. M. L., p. 14.] It is also distinguished from the naval code in this remarkable particular, that the Army Act, although it defines the greater number of offences and their punishments, reserves power to the Crown and to the Admiralty respectively, to make articles of war for the better government of the forces to which they relate, provided such articles are in accordance with the provisions of the Army Act.

[1] 37 G. 3, c. 70, 71.

[2] 22 G. 2, c. 33, s. 36.

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General power given to courts-martial to moderate sentences.

In 1847 the sanguinary enactments of the last century were modified, and a discretionary power given to naval courts-martial to award a mitigated sentence in the case of all capital crimes except murder and sodomy.[1]

Naval Discipline Act, A.D. 1860.

The Naval Discipline Act[2] has incorporated the provisions of this statute, and remodelled and reformed the naval code, which, with the trifling alterations already noticed, had been in force for two centuries. The criminal law of England was gradually mitigated during the nineteenth century, and is now in accordance with true humanity and the requirements of modern society. The consolidated law of the navy is by this Act brought into due conformity with the law of the land: a necessary distinction must always exist; for the strict maintenance of discipline, among bodies of men massed together in ships of war, demands for the most part absolute authority in the commander, and absolute subordination in the seamen. "The salvation of the country depends upon the discipline of the fleet; without discipline they would be a rabble, dangerous only to their friends, and harmless to the enemy."[3] But discipline is not a power that can stand by its own strength alone: the abuse of the name has often been the bane of the service. In times past many captains broke the spirit of their crews by petty tortures and petty persecutions—punishment in fact, where no punishment was due: there was no escape from tyranny within the narrow confines of a ship.

Reflections on naval discipline.

The well-being of the navy depends on the good feeling and attachment of the sailor. Martinets may say that without rigour of discipline, there can be naught but laxity of discipline; yet there is a mean, known to officers with the faculty of command: ships, in which duty is well carried out by willing men, and certainty of punishment the unfailing doom of the disaffected and really criminal.

[1] 10 & 11 Vict. c. 59.

[2] The Naval Discipline Acts of 1860, 1861, 1864 and 1865 are repealed; and the Act in force at the present time is the Naval Discipline Act of 1866, as amended by the Acts of 1884 and 1909.

[3] *Sutton* v. *Johnstone* (1786), 1 T. R. 549. *Per* Lords Mansfield and Loughborough.

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CHAPTER II.

COURTS OF INQUIRY.

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Origin of Courts of Inquiry.

The power to institute Naval and Military Courts of Inquiry is a prerogative of the Crown, delegated by the Crown to the Board of Admiralty and Commander-in-Chief of the Army. The practice of holding such courts is a very ancient and beneficial usage, sanctioned by the judicial recognition of the courts of common law.[1]

There are many instances that illustrate the action of a Court of Inquiry and its consequences.

Case of the Earl of Torrington.

In 1690, a Court of Inquiry was held by direction of the Privy Council[2] to investigate the conduct of the Earl of Torrington as Commander-in-Chief in the Channel: the Commissioners reported, "that he had, in the engagement with the French off Beachy Head, through treachery or cowardice, misbehaved in his office, drawn dishonour on the English nation, and sacrificed our good allies, the Dutch."[3] After some constitutional objections, which were ultimately removed by Act of Parliament, Lord Torrington was tried by a court-martial, and, notwithstanding that the court unanimously acquitted him of any imputation whatever on his conduct in the engagement in question, his commission was suspended, and he was never afterwards employed.

[1] *Home* v. *Bentinck*, Judgment in Court of Error (1820), 2 B. & B. 152; *Dawkins* v. *Lord Rokeby* (1875), L. R. 7 H. L. 744.

[2] Campb. Adm. ii. 426. [3] McArthur, i. 109.

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Sir John Mordaunt's case.

In 1757 the King, by a warrant directed to the Judge-Advocate-General, nominated the Duke of Marlborough and Major-Generals Lord George Sackville and Waldegrave as commissioners to hold a Court of Inquiry on the general and other officers employed on the Rochefort expedition; and they were directed to make the necessary inquiry, and report the causes of failure, with their opinion thereon, to his Majesty.

Sir John Mordaunt, the commander of the expedition, was afterwards tried by a general court-martial, on charges which were founded on the report of the Court of Inquiry.[1]

Colonel Home's case.

In 1819, a Court of Inquiry was appointed to inquire into the conduct of Lieut.-Colonel Home in some transactions with respect to a mining adventure: the Court, in their report, censured the conduct of Lieut.-Colonel Home very severely; and, in consequence, he was deprived of his commission. But in his case there was no court-martial, as the Judge-Advocate was of opinion that the matters alleged against Colonel Home were not cognizable by a military tribunal.[2]

Privilege of accused at a Court of Inquiry.

Although an officer cannot refuse to obey an order directing him to appear before a Court of Inquiry, charged to inquire into his conduct, yet he may object to take any part in the proceedings, and has a right to decline answering any questions or making any statement which may, in his opinion, be prejudicial to him in the course of any ulterior proceedings. This rule would clearly entitle the accused to decline, although ordered or requested, to produce certain books and documents.[3]

Nature of Court of Inquiry.

A Court of Inquiry has often been compared to a grand jury,[4] an institution which it resembles in some respects; but the proceedings before a Court of Inquiry are much more like the preliminary investigation before

[1] McArthur, i. 113. [2] *Home* v. *Bentinck* (1820), 2 B. & B. 159.
[3] Simla court-martial, Simmons, 355—6. For privilege of witnesses at Courts of Inquiry, see *post*, pp. 30, 295, and 368.
[4] Adye on Courts-Martial, 37.

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a magistrate in criminal cases, where the accused is discharged at once if there be no adequate case against him, but committed for trial, if there be sufficient evidence of guilt. There is no further analogy in either case; for all criminal proceedings before the ordinary tribunals are compulsory and on oath, whilst proceedings before Courts of Inquiry are neither compulsory nor on oath.

Advantages of Courts of Inquiry.

Courts of Inquiry are very useful in the investigation of all doubtful transactions, particularly in cases where public obloquy has been incurred, or the conduct of commanders become the subject of general animadversion in the navy. They are also very effective in adjusting disputes between officers, and reconciling all differences and animosities that may occur in service amidst the various tempers and caprices of men; for character and reputation often suffer the most where no such criminality can be imputed against either party as would support a charge before a court-martial.

Admiralty regulations respecting Courts of Inquiry.

The following rules, originally issued by the Admiralty in 1863, for the guidance of officers in ordering and holding Courts of Inquiry, are quoted from the "Admiralty Instructions" of 1906:—

Art. 698.—The duties of a Court of Inquiry depend on the instructions which the authority ordering the Court may think proper to give. The instructions should always be in writing.

Art. 699.—A Court of Inquiry may be used by any officer in command of a fleet or squadron, station, or division of a station, to enable him to arrive at a correct conclusion on any matter upon which he requires to be thoroughly informed, or upon which there may be a question whether it should form the subject of a court-martial.

2. A Court of Inquiry has no power to award any punishment; it can only recommend. It may, however, be invested with any power, not exceeding that of the convening officer, which may be necessary for the proper conducting of the inquiry, such as calling before it naval witnesses and requiring the production of official papers. It may be reassembled as often, and with such alterations in its composition, as may be directed.

3. It is not a judicial body; it has no power to compel the attendance of civilians as witnesses, nor to examine on oath.

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4. It may be required to examine witnesses and record their evidence, without being required to give any opinion; no one before it charged with any offence is bound to make any statement or answer any questions.

5. Members of a Court of Inquiry are not disqualified to sit on a court-martial upon the same subject matter, because they have so acted, but they may be objected to, and the objection allowed by the Court, and this contingency is to be considered in selecting the members. So far as may be practicable and consistent with a due regard to this contingency, the president and members should be senior to the person whose conduct is under inquiry.

6. A Court of Inquiry, unless otherwise ordered, shall sit with closed doors.

7. The person concerned in the result of the inquiry should be present during the whole time that witnesses are being examined, but should he object or refuse to be present, the proceedings are to be carried on in his absence.

8. No person is to be present in the character of a prosecutor, nor is any friend or professional adviser to be allowed to assist any person concerned in the Inquiry.

9. Every person about to make a statement or answer a question likely to incriminate himself should be cautioned by the Court that what he is about to state may be made use of against him. All such cautions should be recorded in the minutes.

10. If the inquiry should have reference to the loss or hazarding of a ship, the course directed by Art. 681, with the exception of taking evidence on oath, is to be pursued.

11. The minutes of the proceedings are to be signed by all the members, and forwarded by the president to the authority ordering the inquiry. In case of difference of opinion on any material point among the members, the grounds of difference are to be fully stated.

Art. 700.—The proceedings are in all cases to be sent to the Commander-in-Chief, who, in the absence of special directions, will exercise his discretion as to forwarding them to the Admiralty.

Report is a privileged communication.

The report of a Court of Inquiry is in its nature a confidential and privileged communication, protected from the process of the Courts of Law.[1]

[1] *Home* v. *Bentinck* (1820), 2 B. & B. 162; *Dawkins* v. *Lord Rokeby* (1875), L. R. 7 H. L. 744. See p. 295, *post.*

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CHAPTER III.

ARREST.

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Authority to arrest.

BY virtue of his position, a commanding officer has authority to place in arrest any person under his command, who may disobey orders or be guilty of any other misconduct. On the arrest of an officer, the case must be reported, with particulars of the charge, in the proper quarter, in order that, if necessary, a court-martial may be held at the earliest opportunity.

The course to be pursued is specifically laid down in the "Admiralty Instructions" on Discipline:—

Course to be followed when an officer is placed under arrest.

1. If an officer should disobey orders, or otherwise misbehave, he may be placed in arrest, and a report of the particulars of the offence shall be transmitted by the captain to his superior authority, as soon as possible. But if the captain should be induced from any circumstances to release him from arrest, and to withdraw or allow to be withdrawn the charge against him, such officer is to return to his duty without prejudice to the future investigation of any complaint which he on his part may make relative to such arrest. If the captain or other superior officer should consider the cause for placing an officer in arrest to be of such a nature as to necessitate its being brought before a court-martial, but circumstances of the service should render it necessary that the officer in arrest should be released without the withdrawal of the charge against him, he may so

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release him, and the officer shall return to his duty accordingly, without prejudice to his future trial or to the inquiry into the charge on which he was placed in arrest.

No unnecessary restraint.

2. When an officer or man is placed in arrest, the captain is to take care that no more restraint is put upon his personal liberty than the discipline of the service requires, and the nature of his offence may render expedient. Arrest is not a punishment, but is a means adopted to ensure the safe custody of an offender until he can be adequately dealt with. [Adm. Inst. 714.]

The degree of restraint to be imposed upon the prisoner is pointed out by the above-mentioned regulation, as well as prescribed by the immemorial usage of the naval service, but in any case the nature of the arrest should not be such as to justify a plea that the offender has thereby been punished for his offence. In point of law it is in the discretion of the superior officer to say whether an arrest shall be close or at large. In the case of *Hannaford* v. *Lunn* (1825, 2 C. & P. 156), Chief Justice Abbot said: "If a superior officer put a party under arrest *without cause*, then the difference between arrest close, or at large, is a matter of consideration only with a view to the estimate of damages."

Consequences of an illegal arrest.

It must always be the duty of a commanding officer to examine charges against an accused person with caution and discretion, before he places him under arrest; for if an officer be arrested without cause,[1] or treated with undue severity when under arrest,[2] or detained in custody longer than is necessary,[3] he will be entitled to bring an action for false imprisonment against the commanding officer who ordered the arrest.

Privileges of parliament no protection from naval arrest.

The privileges of parliament do not protect a person belonging to the navy or army from being amenable to a court-martial for offences committed in his naval or military capacity; but previous to the arrest of any

[1] *Swinton* v. *Molloy* (1783), 1 T. R. 537.
[2] *Wall* v. *Macnamara* (1779), 1 T. R. 536.
[3] *Bradley* v. *Arthur* (1825), 4 B. & C. 295.

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member for the purpose of trying him by a naval or military court-martial, it is usual to give notice to the house of which he is a member, and to request the consent of parliament to the arrest and trial, that public justice may be done.[1]

The previous remarks bear principally on the arrest of officers, but the law and regulations are the same for the seamen.

Power to arrest offenders.

Considerable powers have been given by the Naval Discipline Act in furtherance of the capture of offenders, who may attempt to evade justice. It is enacted by ss. 50 and 51 :—

> Every officer in command of a fleet or squadron of her Majesty's ships, or of one of her Majesty's ships, or the senior officer present at a port, may, by warrant under his hand, authorize any person to arrest any offender subject to this Act for any offence against this Act mentioned in such warrant ; and any such warrant may include the names of more persons than one in respect of several offences of the same nature ; and any person named in any such warrant may forthwith, on his apprehension, if the warrant so directs, be taken on board the ship to which he belongs, or some other of her Majesty's ships ; and any person so authorized may use force, if necessary, for the purpose of effecting such apprehension, towards any person subject to this Act.

Penalty for not assisting in detection of prisoners.

> Every person subject to this Act who shall not use his utmost endeavours to detect, apprehend, and bring to punishment all offenders against this Act, and shall not assist the officers appointed for that purpose, shall suffer imprisonment or such other punishment as is hereinafter mentioned.

The warrant of arrest.

The warrant of arrest may be delivered to *any person* for execution.

This provision enables the naval authorities to apply for the aid of the civil power, and to avail themselves of the assistance of the police in all places, for the purpose of affecting the apprehension of criminals.

[1] 2 McArthur, 3.

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The warrant is a protection to the person authorized to execute it in using force when necessary towards *any offender subject to the Naval Discipline Act* for the purpose of effecting such apprehension.

(For copy of Admiralty form of warrant, *vide* App. I., No. V.)

In order that the warrant may be a justification for any acts done under its authority, it must show jurisdiction on the face of it in the following particulars :—

1st. The signature of the officer issuing the warrant, with the date, and an allegation that he commands a fleet or squadron, or one of his Majesty's ships, or that he is the senior officer present at a port.

2ndly. An allegation that the offender is subject to the Naval Discipline Act.

3rdly. A short statement of the offence, with an allegation that such offence has been committed against the Naval Discipline Act.

Arrest of a superior officer.

Circumstances may occasionally arise which compel an officer to place his superior under arrest. Such a measure should not be adopted unless necessitated by the urgent requirements of the public service; the officer ordering the arrest must be prepared to exonerate himself from undue haste, or from malicious action, and to prove that the exigencies of the service justified him in having recourse to such a proceeding.[1]

In February, 1872, the senior lieutenant of her Majesty's ship "Torch" was tried by court-martial for placing his commander under arrest without necessity, for keeping him in arrest longer than was necessary, and for removing the ship from her station contrary to the order given to her commander. The court fully acquitted him in consideration of the peculiar and trying position in which he was placed, which demanded the course he judiciously and properly adopted. The commander had

[1] See p. 143.

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been previously (August, 1871) dismissed the service by court-martial for using abusive language to the boatswain, drunkenness on shore and on board, placing the boatswain under arrest without due cause, threatening to shoot the senior lieutenant, &c. [C. M. Sentences, Nos. 1116 and 1142.]

"The assumption of a present command by the inferior is tolerated, rather than that the military state should be endangered by violent evils, which, if not instantly repressed, might result in irremediable mischief. This assumption is not, however, allowed to continue longer than the necessity itself exists, that is, until the superior officer of the parties arrested can be made acquainted with the circumstances." [O'Brien, quoted by Harwood, "U.S. Naval C. M.," p. 38.]

Exemption from apprehension by civil power of officers and men under naval arrest.

The Admiralty Instructions, Article 800, clauses 2 and 3, point out the exemption from apprehension by civil power of officers and men already under naval arrest, whether for debt or otherwise. In the case of debt there may be no apprehension by the civil power of a person already in naval arrest; and for any other cause the only way in which he may be legally obtained by the civil power is by writ of "habeas corpus." Mr. Justice Huddleston said that neither a commissioned officer, petty officer, seaman, non-commissioned officer of marines, nor marine, being under arrest or a prisoner on board one of H.M. ships for trial by court-martial, is liable to be taken under civil process. If he were liable, the whole proceedings of the court-martial might be frustrated, and by means of a judgment and execution of a friendly creditor an offender might be withdrawn from the jurisdiction of the naval authorities. The fact of such prisoner being a patient in a naval hospital does not make any difference, and is provided for by clause 4 of Article 800.

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CHAPTER IV.

THE APPLICATION FOR A COURT-MARTIAL.

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Method of applying for Court-martial.

THE Admiralty Instructions contain the following regulations as to the manner in which an application for a court-martial is to be made.

Where a Specific Charge is Made.

Circumstantial Letter.

659. An application for the trial by court-martial of any person on any charge shall be made as follows. There shall be forwarded to the Convening Authority through the usual channels a letter, hereinafter called the Circumstantial Letter, reporting the circumstances on which the charge or charges are founded in the order of their occurrence, and in sufficient detail to show the real nature and extent of the offence; when words constitute the substance of the offence, they are to be fully and exactly set out. The letter is not to refer in *any way* to the previous character or conduct of the offender, nor contain any reference to facts prejudicial to him other than such as bear directly on the charges.

Circumstantial Letter, use of.

659a. It is of the utmost importance that the Circumstantial Letter should state in the clearest possible terms the details of the facts upon which the Charge is based, not only because it is intended to afford to the Convening Authority the information upon which a decision as to the desirability or not of ordering a court-martial must be based, but also because it is the means by which the accused is informed of the facts which are alleged against him. The Charge must be specific in order to give notice to the accused of what he is to come prepared to defend.

ii. If the complaining officer should desire to enter into further explanations as to his reasons for asking for a court-martial which would necessarily refer to the previous conduct or antecedents of the accused, he should do so verbally or by

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separate letter to his superior, which must not in any circumstances be laid before the court.

When captain should not investigate a complaint.

iii. It is undesirable, in cases where the captain of a ship may be required to sit as a member of a court-martial, that he should himself investigate a complaint, which, on the face of it, may be likely to form the subject of a charge for trial. The investigation in such a case should be undertaken by the Executive Officer, who is to sign the Circumstantial Letter and the letter enclosing the Charges, addressing both to the captain. The captain shall then forward them to his superior.

iv. On Stations where, on account of the small number of ships available, there is difficulty in obtaining the officers necessary to form a court, officers should be particularly careful in this matter, because an objection on the part of the prisoner to be tried, based on the fact that one of the members of the court had already investigated his case and expressed an opinion upon it, would be admitted by the court, and, no other officer of the necessary rank being available, a court-martial could not be held until another opportunity presented itself.

Documents to be sent with Circumstantial Letter.

660. There shall also be forwarded at the same time as the Circumstantial Letter a further letter enclosing—

(*a*) The charge or charges drawn in accordance with the prescribed forms in the very words in which the offence is described in the section of the Naval Discipline Act under which it falls.

Note 1.—Any number of persons may be tried together for an offence charged to have been committed by them collectively. If, however, it is found that one or more of them are required as witnesses for the Prosecution or Defence, it is desirable that separate charges should be framed and separate trials held. Offences under different sections of the Naval Discipline Act are not to be included in one and same charge.

Note 2.—Further instructions as to framing charges will be found on p. 40.

(*b*) A list of Witnesses for the Prosecution.

(*c*) A Summary of Evidence in support of the Charges,

And when the offender is below the rank of subordinate officer,

(*d*) A certified extract of all entries of offences and punishments in Conduct Book, or Company Conduct Sheet in the case of a Marine, prior to the date of the offence charged but subsequent to his joining his present ship, and a Conduct Sheet with his character assessed from the previous 31st December to the

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date of the offence with which he may be charged but excluding all consideration of it.

(*e*) A certified copy of the offender's Certificate of Service.

Scrutiny by Senior Officer.

660a. A Senior Officer is not to forward the above documents to the Convening Authority until he is satisfied that the foregoing regulations have been attended to.

Accused to have opportunity of preparing defence.

661. An accused person, for whose trial by court-martial an application has been made, shall be afforded full opportunity of preparing his defence, and of free communication with his witnesses, or with any adviser whom he may wish to consult.

Accused may have person to assist him.

(2) Unless the person charged desires to conduct his own case, he may have a person or persons to assist him during the trial, whether an officer, legal adviser, or any other person. In case a prisoner below the rank of officer should not obtain the help of anyone for that purpose, it is to be considered part of the ordinary duty of the officer of his division, or detachment if he is a Marine, to watch the case on his behalf, and assist him should he desire it.

(3) In the event of the officer of the division or detachment being a witness for the Prosecution, or unavailable, or ineligible for the duty for any other reason, the Captain is to direct another officer to assist the prisoner.

Note.—The powers of the person assisting the prisoner are defined in Art. 674. Adm. Inst.

Where no Specific Charge is Made.[1]

Crews of ships lost or destroyed. N.D.A. s. 91.

When any one of her Majesty's ships shall be wrecked or lost or destroyed, or taken by the enemy, such ship shall, for the purposes of this Act, be deemed to remain in commission until her crew shall be regularly removed into some other of her Majesty's ships of war, or until a court-martial shall have been held, pursuant to the custom of the navy in such cases, to inquire into the cause of the wreck, loss, destruction, or capture of the said ship.

All the officers and crew of lost ship may be tried by one Court. N.D.A. s. 92.

When no specific charge shall be made against any officer or seaman or other person in the fleet for or in respect or in consequence of such wreck, loss, destruction, or capture, it shall be lawful to try all the officers and crew or all the surviving officers and crew of any such ship, together, before one and the same court, and to call upon all or any of them when upon their trial to give evidence on oath or affirmation before the court touching any of the matters then under inquiry, but no officer

[1] See pp. 156—162.

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or seaman or other person shall be obliged to give any evidence which may tend to criminate himself.

Power of Convening Authority to order court-martial under ss. 91 & 92 N.D.A.

662. The Convening Authority may, subject to any Orders from time to time made by the Admiralty, on his own motion issue a Warrant in the prescribed form in accordance with the provisions of sections 91 and 92 of the Naval Discipline Act, convening a court-martial to inquire into the cause of the wreck, loss, destruction, or capture of one of his Majesty's ships.

Form No. 2.

(2) No Circumstantial Letter shall be necessary, but if the Convening Authority shall have received from the Commanding Officer, or from the senior surviving officer of such ship, a report of the circumstances of the loss, &c., such report shall be sent with the Warrant to the President of the Court.

Cases on which a court-martial under s. 92. is permitted.

662a. A Convening Authority shall not issue his Warrant convening a court-martial, under the provisions of sections 91 and 92 of the Naval Discipline Act, to inquire into the cause of the wreck, loss, destruction, or capture of the said ship, unless, upon full consideration of all the available information, he shall be of opinion that there is no reasonable ground for thinking that any one or more of the survivors is to blame.

In other cases Charges to be prepared.

ii. When in any case the Convening Authority shall, upon full consideration of all the available information, be of opinion that it is probable that any one, or more, of the survivors is to blame for the wreck, loss, destruction, capture, hazarding, or stranding, of one of his Majesty's ships, the Convening Authority shall direct the officer appointed by him to conduct the Prosecution to prepare a Circumstantial Letter and Charge or Charges, and shall issue his Warrant in the prescribed form for the trial of such one or more of the officers or crew under sections 2, 5 or 29 of the Naval Discipline Act, as the case may be.

Note.—Attention is directed to the power conferred by Article 699 of the King's Regulations and Admiralty Instructions on an Officer in command of a Fleet or Squadron, Station, or Division of a Station to order a preliminary Court of Inquiry in all cases such as those mentioned in the preceding paragraphs. [Adm. Inst.]

Circumstantial Letter.

In most cases it will be found a great help in drafting the Circumstantial Letter to complete first the Summary of Evidence, carefully discarding from the statement of each witness what any other witness, who

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will give his own evidence, may have said to him. The narrative, arranged as required by Articles 659 and 659A of the Admiralty Instructions, can then be compiled from the various statements.

Letter forwarding charges.

The "Letter Forwarding Charges" presents no difficulties but a specimen for guidance is given in Appendix I., No. II.

Spare copies.

To provide copies for retention in office and for the accused, the Circumstantial Letter, Charge Sheet, and List of Witnesses for the Prosecution should be rendered in triplicate, which can be done easily when those papers are being typewritten.

Drawing the charge.

The "framing" or "drawing" of a charge is a matter requiring careful consideration and a study of the various sections of the Act, in order that the offence may be described under its appropriate heading. Skeleton forms of charges, and extracts from the Act classified under their proper sections, with explanatory notes, will be found conveniently arranged in Appendices of this book. If these be looked through it will be found that the following, taking them as they occur in a completed charge, are the principal particulars which require to be set forth in order to inform the court of the specific subject of its inquiry, and the accused of the specific allegations which he has to meet.

Particulars of charge.

Single charge for several persons.

(*a*) To frame a single charge for the trial of several persons who have participated in one and the same offence, but should two prisoners charged with the same offence wish each other's evidence to be heard on their behalf, separate courts-martial should be requested for their trial.

Separate charges for different offences.

(*b*) To frame separate charges for offences against different sections of the Naval Discipline Act : thus a man accused of being drunk and striking his superior officer should be tried on two charges under ss. 27 and 16 respectively.

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But repeated instances of the same description of offence may be included in the same charge—*e.g.*, where a man is found in possession of various articles of clothing, the property of other men. If the thefts can, however, be shown to have taken place on separate days there should be separate charges. Exceptions.

(*c*) To insert at full length the rank or rating, and the names of each person referred to and, in the case of a person below the rank of officer, the official number. Rank and names.

(*d*) To show that the accused, at the time of committing the alleged offence, belonged to one of his Majesty's ships, and was therefore subject to the Naval Discipline Act and within the jurisdiction of the court. Subjection to Act.

(*e*) To quote in words at full length the date of the alleged committal of the offence charged. Date.

(*f*) To describe accurately the act or omission constituting the alleged offence, combining brevity with clearness by avoiding the introduction of all unnecessary details. Where "threatening" (or) "insulting language" is the offence, the words alleged to have been used by the accused are not to be stated in the charge, as they are supplied by the Circumstantial Letter, which will be read in court after the charges, and of which a copy is sent to the accused previous to his trial. Description of offence.

(*g*) To follow, so far as may be practicable, the wording of the section of the Naval Discipline Act, against which the offence is alleged to have been committed. To follow wording of Act.

(*h*) To state in the charge such circumstances connected with the alleged offence as attach to it higher criminality, or otherwise qualify it, *e.g.* :— To state qualifying circumstances.

Misconduct *in the presence of the enemy.*

Desertion *to the enemy.*

Striking a superior officer *in the execution of his office.*

Striking, or attempting to strike, *with a weapon.*

In preparing charges, it is desirable on the one hand that they should not be unduly multiplied. It is in general sufficient Redundant and alternative charges.

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to frame charges based on the salient facts, omitting minor charges which might perhaps have been added.

E.g., behaving with contempt to a superior officer need not be alleged when actual striking is alleged; using bad language to an escort when actual violence can be proved.

On the other hand, where there is a doubt whether a more serious charge will be completely established, it is sometimes desirable to include a further charge of another and less serious class upon which, if the facts warrant it, the prisoner may be convicted, as section 48 of the Naval Discipline Act only authorizes the court to find a prisoner guilty of another less serious offence *of the same class* as that charged.

For instance, if the facts suggest that a charge of mutiny, or joining in, or inciting others to join in a mutinous assembly, may be properly framed, it may be desirable to add a charge framed under section 43 as for an act to the prejudice of good order and naval discipline, in behaving in a disorderly manner. Or, to take another instance, with a charge of theft it may be desirable to join a further charge of receiving the property knowing it to have been stolen. But when this course is followed, care must be taken not to convict the prisoner of two or more inconsistent charges. [C. M. Memo., p. 47.]

"Charge sheet."

The sheet on which the charges are written is to be headed "Charge Sheet" only. It is not desirable to write each charge on a separate sheet, nor need the charge sheet be signed.

Certified extracts, &c.

The certified extracts from the "Conduct Book" or "Company Conduct Sheet," and the copies of certificates, should, if possible, be made on spare sheets of the same form, both for facility in copying and to assist in verifying the copies in court.

List of witnesses.

The "List of Witnesses" should contain ranks or ratings, full Christian names and surnames, and official numbers of petty officers and men as directed in Article 1580, clause 2: non-commissioned officers and men of the Royal Marines should be described exactly as

Description of Marines.

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laid down in Article 1145 of the Admiralty Instructions; but in the Circumstantial Letter, in order to avoid matter tending to break the clearness of the narrative, after the first full mention of an officer or man's name, they may be referred to more briefly: an officer or petty officer by rank and surname, a man by surname only: thus "Stoker petty-officer Smith told Robinson to fall in" etc. Official numbers.

Although one witness may suffice to prove a charge, all who can give evidence should, as a rule, be summoned, it being open to the prosecutor, or the court, to abstain from calling any of the witnesses who may have been summoned.

The "Summary of Evidence" should be an *abstract* of the points against the prisoner to which each witness will depose. It need not contain a detailed *verbatim* statement of each witness's deposition, nor be signed by the witness, nor is it necessary to devote a separate sheet to each witness's evidence. A specimen is given in Appendix I., No. III. Summary of evidence.

A senior officer should not forward charges to the convening authority with a view to a court-martial being ordered without previously satisfying himself that the charges are properly framed and carefully drawn, and that the Circumstantial Letter does not refer in any way to the previous character or conduct of the offender, nor contain allusions to his prejudice; should it do so, he must return it for correction, and for the adoption of the course laid down in clause ii. of Article 659A, Admiralty Instructions. Duty of senior officer on receiving applications for courts-martial.

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CHAPTER V.

ON THE POWER TO ORDER COURTS-MARTIAL AND PROCEEDINGS PRELIMINARY TO TRIAL.

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General power to order courts.

The general power to order naval courts-martial is contained in clause 9 of s. 58 of the Naval Discipline Act, which states that:—

> The Admiralty shall have power to order courts-martial to be held for the trial of offences under this Act, and to grant commissions to any officer of her Majesty's navy on full pay authorizing him to order courts-martial to be held for the trial of such offences.

Trial cannot be claimed as a right.

From this it appears that a discretionary power to grant a trial is vested in the officer authorized to order a court-martial, and that consequently no person serving in the navy has any legal right to demand a

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trial by court-martial for the adjudication either of charges against himself, or of charges preferred by him against any other person subject to the Naval Discipline Act. The Act does not contain anything to contradict this inference, whereas marines whilst serving ashore under the Army Act may, in certain circumstances, demand trial by court-martial.

Further directions as to ordering courts.

The following clauses, 10 to 14, of the same section, proceed to deal with the limitations, contingencies, and powers of delegating the authority to order courts-martial :—

(10) An officer holding a commission from the Admiralty to order courts-martial shall not be empowered to do so if there is present at the place where such court-martial is to be held any officer superior in rank to himself on full pay and in command of one or more of her Majesty's ships or vessels, although such last-mentioned officer may not hold a commission to order courts-martial ; and in such a case such last-mentioned officer may order a court-martial, although he does not hold any commission for the purpose :

(11) If any officer holding a commission from the Admiralty to order courts-martial, having the command of a fleet or squadron, and being in foreign parts, die, be recalled, leave his station, or be removed from his command, the officer upon whom the command of the fleet or squadron devolves, and so from time to time the officer who shall have the command of the fleet or squadron, shall, without any commission from the Admiralty, have the same power to order courts-martial as the first-mentioned officer was invested with :

(12) If any officer holding a commission from the Admiralty to order courts-martial, and having the command of any fleet or squadron of her Majesty's ships in foreign parts shall detach any part of such fleet or squadron, or separate himself from any part of such fleet or squadron, he may, by commission under his hand, empower, in the first-mentioned case, the commanding officer of the squadron or detachment ordered on such separate service, and in case of his death or ceasing so to command, the officer to whom the command of such separate squadron or detachment shall belong, and in the secondly-mentioned case the senior officer of her Majesty's ships on the

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division of the station from which he is absent, to order courts-martial during the time of such separate service, or during his absence from that division of the station (as the case may be), and every such authority shall continue in force until revoked, or until the officer holding it returns to the United Kingdom or until he comes into the presence of a superior officer, empowered to order courts-martial in the same squadron, detachment, or division of a station, but so that such authority shall revive on the officer holding it ceasing to be in the presence of such a superior officer, and so from time to time as often as the case so requires :

(13) The officer ordering a court-martial shall not sit thereon :

(14) The president of every court-martial shall be named by the authority ordering the same, or by any officer empowered by such authority to name the president.

Order for court in United Kingdom.

Courts-martial are held in the ports of the United Kingdom under warrants from the Admiralty or officers holding commissions empowering them to convene courts-martial.

Foreign stations.

Commanders-in-chief on foreign stations, and officers in command of detached squadrons, are furnished with commissions authorizing them to assemble courts-martial. In some cases the senior officers of divisions on foreign stations are (under clause 12) empowered by the commander-in-chief [1] to hold courts-martial during their absence from his flag.

The following articles of the Admiralty Regulations lay down the duties of the Convening Authority :—

Convening Authority to satisfy himself of sufficiency of charges and evidence.

663. When it is proposed to try a person on any charge, the Convening Authority shall not order a court-martial to assemble until he shall have satisfied himself that the charges are correct and sufficient, and that they are properly framed and carefully drawn up, and until he has also satisfied himself that the evidence, if uncontradicted or unexplained, will probably suffice to ensure a conviction.

[1] On assuming command of a foreign station, it would appear to be advisable, though not absolutely necessary, for a commander-in-chief to renew the warrants held by senior officers detached to assemble courts-martial. [Admiralty, 16th Dec. 1867.]

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The President of every court-martial shall be named by the authority ordering the same, or by any officer empowered by such authority to name the President. To appoint and issue warrant to President.

(2) The Convening Authority shall issue to the officer appointed by him to preside at the court-martial a warrant under his hand in the prescribed form, directing him to assemble a court-martial, and shall, when the court-martial is appointed to try any person on any charge, transmit to the President the Circumstantial Letter and the Charge or Charges with the Warrant. N.D.A. s. 58 (14).

663a. Should the rank of the person to be tried, or the character of the offence charged, be such as require that the court should be composed of officers of standing and experience, the Convening Authority is to be careful to select as President an officer of such seniority as may ensure the attendance of the officers of the highest rank who may be present with their ships at the place where the court-martial may be ordered to assemble ; but should the nature of the offence be such as may be properly dealt with by officers of less experience, he may select any eligible officer to preside whom he may consider most desirable, with reference to the convenience of the Service. Selection of President.

ii. The Convening Authority or the Senior Officer, as the case may be, must direct that the two officers next in seniority qualified to sit, or such further number as are likely to be required, shall present themselves as spare members when the court assembles. Spare members.

664. In any case the Convening Authority, if Commander-in-Chief of any fleet or squadron, may, in the absence of the Judge-Advocate of the Fleet or his Deputy, and in default of any appointment in that behalf by the Admiralty, by Warrant under his hand in the prescribed form, appoint a person to officiate as Deputy Judge-Advocate at the trial, and shall (except when the trial is to be held under Sections 91 and 92 of the Naval Discipline Act) send him a copy of the charge and of the Circumstantial Letter, and shall forward to him (or to the President for him) in all cases the documents mentioned in Article 660 (*b*) and (*c*), and in case of the trial of an officer, the list of officers who have been tried by court-martial, or a certified extract therefrom, and in the case of the trial of a person below the rank of subordinate officer, the documents mentioned in Article 660 (*d*) and (*e*). May in certain cases appoint a Deputy Judge-Advocate and must forward documents to him.

(2) The Convening Authority, or, in his absence, the Senior Naval Officer present, shall, by Warrant under his hand in the To appoint a provost-marshal.

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prescribed form, appoint a provost-marshal to take the accused into his custody and safely keep him until he shall have been delivered in due course of law.

When to appoint a prosecutor.

(3) It is the duty of the Captain of the ship to which the accused belongs in ordinary cases to act as prosecutor, but if for any reason it is undesirable or impossible for the Captain or Executive Officer of that ship to conduct the prosecution, the Convening Authority shall appoint a competent officer to undertake the duty.

Note 1.—It is important that an officer should be directed to act in the capacity of prosecutor, in order that the evidence may be brought before the court in the manner best calculated to elucidate the case and to forward the ends of justice.

Note 2.—As a general rule it is not desirable that the Captain or Executive Officer of a ship should act as prosecutor in cases of any complication in which that officer is himself necessarily one of the principal witnesses for the prosecution.

Appointment of prosecutor.

The appointment of a prosecutor under clause 3 of Article 664, requires some consideration amongst the proceedings preliminary to trial.

In the great majority of cases the captain, or the executive officer, of the ship in which the prisoner is serving, conducts the prosecution. In some cases a lieutenant or an officer of a civil branch of the navy, belonging to the prisoner's or another ship, has been ordered to conduct the prosecution.

Should the officer ordering the court-martial deem it desirable, in the event of the officer to be tried being himself the captain of a ship, or for other reasons, the article quoted clearly empowers him to select and order any officer to act as prosecutor.

At home.

When the Admiralty is the convening authority, the selection of the president is usually left to the

Abroad.

commander-in-chief. On foreign stations, when a court-martial is to be held at a distance from the commander-in-chief or other officer ordering the court, the selection of the president is often left to the senior officer present. In each case the president's name, which is left blank by the convening authority,

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must be inserted in the warrant before it is transmitted to the president.

When the original charge sheet has been altered, a copy of the new charge sheet should be sent to the officer who preferred the original charge.

The letter from the complaining officer enclosing the charge sheet, &c., is not sent to the court.

In important cases it is expedient that the officer of most experience and position available be appointed to officiate as deputy judge-advocate. [A. L. *L. M. M.*, 9 Feb., 1874].

A form of warrant to the officer officiating as deputy judge-advocate is given in Appendix II., Nos. 3 and 4.

List of officers tried to be kept confidential

The list of officers tried by court-martial must be regarded as "confidential" in regard to the trial about to be held. It may be produced to the court only after the finding has been read and before passing sentence, at which time also the documents relating to the previous history of persons below the rank of officer should be produced. On the conclusion of the trial the list of officers tried is to be returned to the officer from whom it was received, an extract being inserted in the minutes of the court.

Provost-marshal.

A form of warrant to a provost-marshal is given in Appendix II., No. 5. It is ordinarily addressed to some senior member of the ship's police—usually the master-at-arms of the depôt or flagship—and contains directions to him to arrest the prisoner and keep him in safe custody until he shall be delivered in due course of law.

Duties.

The provost-marshal is personally responsible for the production of the prisoner at the court-martial, and is liable to be punished for neglect of duty in the event of his escape after due time shall have elapsed for the warrant to be acted upon.

Degree of restraint.

The following regulation determines the degree of

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restraint to be imposed upon officers or others under arrest :—

When an officer or man is placed in arrest, the captain is to take care that no more restraint is put upon his personal liberty than the discipline of the service requires, and the nature of his offence may render expedient. Arrest is not a punishment, but is a means adopted to ensure the safe custody of an offender until he can be adequately dealt with. [Adm. Inst. Art. 714, cl. 2.]

Timely notice to be given.

Whenever a court-martial is ordered, such timely notice as may be practicable, and which, as a general rule, should be not less than twenty-four hours, shall be given in general orders or by signal to the ships present, so that the proper officers may be prepared to attend at the place and hour appointed. The names of the president and of the officers whose presence it is anticipated will be required are at the same time to be made known ; and after such notice no officer junior to the president, of a rank eligible to sit as a member, is to proceed on leave of absence without the express authority of the officer ordering the court-martial, or of the senior officer present.

Officers liable to serve as members.

(2) On the morning of the day appointed for the court-martial to be held the commander-in-chief or senior officer present shall send to the president a list of the officers who are eligible and may be required to sit as members, notifying if there be any whose attendance is not attainable by reason of the exigencies of the public service. This list is also to give the names of any officers absent on leave. [Adm. Inst. 665, cl. 1 and 2.]

Officers junior to president to attend.

Subject to the foregoing regulations (*i.e.*, clauses 1 to 15 of s. 58), whenever a court-martial shall be held, the officer appointed to preside thereat shall summon all the officers next in seniority to himself present at the place where the court-martial shall be held to sit thereon, until the number of nine, or such number, not less than five, as is attainable, is complete ; subject to this proviso, that the admirals and captains being superintendents of her Majesty's dockyards, shall not be summoned to sit on courts-martial unless specially directed to do so by orders from the Admiralty. [N. D. Act, s. 58, cl. 16.]

Summoning members.

The commander-in-chief or senior officer present shall, by signal, order the president to make a signal not less than one hour before the time appointed for the court-martial to assemble, summoning the officers junior to himself present at the place

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where the court-martial shall be held, to sit thereon, which latter signal shall be deemed to be a compliance with section 58 (16) of the Naval Discipline Act. [Adm. Inst. 665, cl. 3.]

Order for assembling.

A form of "General Order" for assembling a court-martial is given in Appendix II., No. 1.

The "Fleet Signal Book," also contains all necessary signals relating to the attendance of officers at courts-martial, and an order that the ship on board which the court-martial is to be held shall hoist the "Union Jack" and fire a gun when the colours are hoisted on the day the court is to sit; or when the signal is made if the court is to sit immediately. The Jack is to be dipped between each separate court; hauled down when the court dissolves or adjourns for the day; and hoisted with the colours in the morning or at any time previously that the court may re-assemble.

Notice to complainant.

The complainant will learn from the general order or signal that a court-martial has been convened; but in order that he may know that it is for the trial of a complaint preferred by him, the officiating deputy judge-advocate must notify him in the form given in Appendix II., No. 7. In the same communication, reference is made to certain documents which he should be reminded to produce at the trial, and other matters.

Prisoner to be furnished with copy of charge, &c. at least 24 hours before trial.

2. In every case in which any person is about to be tried on any charge the President shall satisfy himself that the accused has been furnished, at the earliest possible moment, with a copy of the Charge Sheet and of the Circumstantial Letter, a list of Witnesses for the Prosecution, and a notice that it is competent for him to give evidence on his own behalf.

Except in pressing circumstances or mutiny.

3. If, in pressing circumstances, where delay would be very inconvenient to the public service, the above-mentioned documents shall not have been furnished to the prisoner twenty-four hours before trial, this fact shall be recorded in the minutes of the proceedings, together with a statement of the pressing circumstances which prevented their being so furnished.

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Notwithstanding anything herein contained, in the case of mutiny the trial may take place immediately after the commission of the offence. [Adm. Inst. Art. 668, cl. 2, 3, and 4.]

The forwarding of these documents to the prisoner, without any delay, is part of the duty of the judge-advocate. A form of communication from him to the prisoner is given in Appendix II., No. 8.

Procuring attendance of witnesses.

(2) The Judge-Advocate shall take the necessary steps to procure the attendance of the witnesses whom the prosecutor or the accused may desire to call, and whose attendance can reasonably be procured, serving them with a summons in the prescribed form under section 66 of the Naval Discipline Act. Should it appear that any witness has been summoned without due cause, the person requiring the attendance of such witness may, at the discretion of the Admiralty at home, or Commander-in-Chief abroad, be required to refund the cost of such attendance. [Adm. Inst. 669, cl. 2.]

The proper steps are thus defined in s. 66 of the Naval Discipline Act:—

Every person, civil, naval, and military, who may be required to give evidence before a court-martial, shall be summoned by writing under the hand of one of the secretaries of the Admiralty, or by the deputy judge advocate, or the person appointed to officiate as deputy judge advocate at the trial; . . .

In reply to the communication which the judge-advocate makes to the accused when forwarding him the copy of the charge, &c. (Appendix II., No. 8), the judge-advocate will receive a list of the witnesses (if any) whom the accused desires to call on his behalf. These witnesses, together with those to be called by the prosecution, must be summoned by the judge-advocate in the form given in Appendix II., No. 10 *b*, which is applicable to civil, naval, and military witnesses. Should any documents be required which are in the possession of the prosecutor or witnesses they should be directed to produce them.

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Prisoners required at courts-martial.

The attendance of persons undergoing imprisonment under the Naval Discipline Act, whether required as witnesses or for trial, is provided for by s. 78 of the Act.

Officer of the court.

A lieutenant, usually of the ship on board which the court-martial is to be held, is detailed for duty as officer of the court. A set of instructions from the president to the officer of the court will be found in Appendix II., No. 6, on the back of which he should be furnished with a list of all witnesses summoned to attend.

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CHAPTER VI.

CONSTITUTION OF COURTS-MARTIAL.

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The constitution of courts-martial is determined by the following regulations contained in the Naval Discipline Act:—

Sec. 58. A court-martial shall consist of not less than five nor more than nine officers:

2. No officer shall be qualified to sit as a member of any court-martial held in pursuance of this Act unless he be a flag officer, captain,[1] commander, or lieutenant of her Majesty's navy on full pay:

3. A court-martial shall not be held unless at least two of her Majesty's ships, not being tenders, and commanded by captains, commanders, or lieutenants of her Majesty's navy on full pay, are together at the time when such court-martial is held:

4. No officer shall sit on a court-martial who is under twenty-one years of age:

[1] Staff captains are therefore not qualified to sit as members of courts-martial.

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5. No court-martial for the trial of a flag officer shall be duly constituted unless the president is a flag officer, and the other officers composing the court are of the rank of captain, or of higher rank :
6. No court-martial for the trial of a captain in her Majesty's navy shall be duly constituted unless the president is a captain or of higher rank, and the other officers composing the court are commanders or officers of higher rank :
7. No court-martial for the trial of a person below the rank of captain in her Majesty's navy shall be duly constituted, unless the president is a captain or of higher rank, nor, if the person to be tried is of the rank of commander, unless in addition to the president two other members of the court are of the rank of commander or of higher rank :
8. The prosecutor shall not sit on any court-martial for the trial of a prisoner whom he prosecutes :
9. The Admiralty shall have power to order courts-martial to be held for the trial of offences under this Act, and to grant commissions to any officer of her Majesty's navy on full pay authorizing him to order courts-martial to be held for the trial of such offences :
10. An officer holding a commission from the Admiralty to order courts-martial shall not be empowered to do so if there is present at the place where such court-martial is to be held any officer superior in rank to himself, on full pay, and in command of one or more of her Majesty's ships or vessels, although such last-mentioned officer may not hold a commission to order courts-martial ; and in such a case such last-mentioned officer may order a court-martial, although he does not hold any commission for the purpose :
11. If any officer holding a commission from the Admiralty to order courts-martial, having the command of a fleet or squadron, and being in foreign parts, die, be recalled, leave his station, or be removed from his command, the officer upon whom the command of the fleet or squadron devolves, and so from time to time the officer who shall have the command of the fleet or squadron, shall, without any commission from the Admiralty, have the same power to order courts-martial as the first-mentioned officer was invested with :
12. If any officer holding a commission from the Admiralty to order courts-martial, and having the command of any

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fleet or squadron of her Majesty's ships in foreign parts, shall detach any part of such fleet or squadron, or separate himself from any part of such fleet or squadron, he may, by commission under his hand, empower, in the first-mentioned case, the commanding officer of the squadron or detachment ordered on such separate service, and in case of his death or ceasing so to command, the officer to whom the command of such separate squadron or detachment shall belong, and in the secondly-mentioned case the senior officer of her Majesty's ships on the division of the station from which he is absent, to order courts-martial during the time of such separate service, or during his absence from that division of the station (as the case may be), and every such authority shall continue in force until revoked, or until the officer holding it returns to the United Kingdom, or until he comes into the presence of a superior officer, empowered to order courts-martial in the same squadron, detachment, or division of a station, but so that such authority shall revive on the officer holding it ceasing to be in the presence of such a superior officer, and so from time to time as often as the case so requires :

13. The officer ordering a court-martial shall not sit thereon :
14. The president of every court-martial shall be named by the authority ordering the same, or by any officer empowered by such authority to name the president :
15. No commander or lieutenant shall be required to sit as a member of any court-martial when four officers of a higher rank and junior to the president can be assembled at the place where the court-martial is to be holden (but the regularity or validity of any court-martial or of the proceedings thereof, shall not be affected by any commander or lieutenant being required to sit, or sitting, thereon, under any circumstances); and when any commander or lieutenant sits on any court-martial the members of it shall not exceed five in number :
16. Subject to the foregoing regulations, whenever a court-martial shall be held, the officer appointed to preside thereat shall summon all the officers next in seniority to himself present at the place where the court-martial shall be held to sit thereon, until the number of nine, or such number, not less than five, as is attainable, is complete ; subject to this proviso, that the admirals and

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captains, being superintendents of her Majesty's dockyards, shall not be summoned to sit on courts-martial unless specially directed to do so by orders from the Admiralty.

Rank and number of members.

It will thus be seen that the Act requires that the following shall be the minimum number, and the lowest rank, of officers, needed to constitute a court-martial:—

For the trial of a flag officer.	The president, a flag officer. Other members, four captains.
For the trial of a captain.	The president, a captain. Other members, four commanders.
For the trial of a commander.	The president, a captain. Other members, two commanders and two lieutenants.
For the trial of any person below the rank of commander.	The president, a captain. Other members, four lieutenants.

Trial of officers of civil branches.

No special provision is made in the Act with regard to the rank of officers required to sit as members of courts-martial held on officers of the civil branches of the navy: it is presumed that the constitution of the court should be decided by the relative rank of the officer to be tried.

Officers disqualified from sitting.

The following officers are disqualified by the Naval Discipline Act from sitting as members of a court-martial:—

a.	Officers under 21 years of age .	sec. 58, cl. 4.	
b.	The prosecutor	,, ,,	8.
c.	The officer ordering the court-martial	,, ,,	13.
d.	Superintendents of dockyards, unless specially directed by the Admiralty to sit	,, ,,	16.

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Members to sit in confirmed rank.

Officers whose duty it may be to attend as members of a court-martial shall sit only in the confirmed rank they hold in the service, notwithstanding they may be borne on the books of the ship to which they may respectively belong in a superior rank, but commodores when not acting in conjunction with senior captains shall sit as commodores, otherwise as captains only.

2. Any officer who, on promotion, may not be re-appointed in the higher rank by the Admiralty, but who may temporarily retain his appointment in the lower rank, shall sit at courts-martial in the rank from which he was promoted, but senior of that rank; if, however, two or more officers promoted to the same rank and similarly circumstanced be present, they shall sit in the order in which they stood on the official list in their lower rank. [Adm. Inst. 666.]

Officers must sit, unless objected to.

All officers present whose rank renders them eligible and whose seniority requires them to attend as members of the court, must sit, unless objected to by the prosecutor or the accused, even though they may be witnesses for the prosecution, and may be fully cognizant of their own knowledge of all the circumstances attending the matter to be tried.

It certainly is embarrassing that a witness, upon whose evidence the decision of the court may ultimately turn, should be a member of the tribunal which is to decide on the credibility or value of such testimony. If, however, it be determined to call him as a witness, the fact should be notified to the person to be tried, who can, under the 62nd section of the Naval Discipline Act, object to be tried by any particular member or to the constitution of the court-martial.

A member of a court, whether previously objected to or not by either side, is not necessarily disqualified from being examined as a witness should it be found in the course of the proceedings that he can give material evidence. [Adm. Inst. 681, cl. 3.]

Officers belonging to same ship as prisoner.

The fact that an officer, whose seniority requires him to sit as a member of the court, belongs to the same ship as the prisoner, in no way affects his liability to act as

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member of the court. The custom of the service requires that the captain of the prisoner's ship shall, if present, be the prosecutor. He cannot, if acting as prosecutor, be called upon to sit as a member of the court. [N. D. Act, s. 58, cl. 8.][1]

Naval courts-martial are general.

All naval courts-martial are *general:* there is no court in the navy corresponding to a regimental court-martial in the army.

Rule of seniority.

Seniority is the principle on which a naval court-martial is constituted; the prevention of a selection of partial judges is the reason assigned for its adoption.

Qualifications necessary for members of courts-martial.

It appears, from a comparison of the different requirements in the Act, that there is no condition therein prescribing that an otherwise qualified officer be on actual service on board any vessel before he can become a member of a court-martial; for the test of liability is *presence at the place on full pay* where the court shall be held [N. D. Act, s. 58, cl. 3 and 16]; but the Admiralty have laid it down that the words "present at the place" do not include officers casually present, belonging to ships which are not present; but only apply to officers borne on the books of ships which are present at that place where the court-martial is to be held. [A. L., 31st Jan., 1871.] Thus any qualified officer on full pay holding a situation in a dockyard (with specified exceptions), or in the coast-guard, or additional for special service, who may be borne on the books of a ship which is present, or any such officer belonging to a ship lost or taken by the enemy, might be liable to sit on a court-martial. It is obvious that no officer could sit on a court-martial touching the loss of his ship; for no man can be a judge in his own cause.

[1] In 1862 a lieutenant of H.M.S. "Miranda" objected to the captain of that ship sitting as president at a court-martial. The other members disallowed the objection. The commodore thought that had he been called upon to state his objections more fully, the court would have allowed them. The Admiralty directed that the sentence should not be carried out. [C. M. Returns.]

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Prisoner's objection to members.

In deciding upon objections against any members, the court should act on principles similar to those observed by criminal tribunals; thus a challenge would be allowed on the ground of some presumed or actual partiality in the juror; as if he be of affinity to either party, or in his employment, or interested in the event; or if the juror has expressed a desire as to the result of the trial, or any personal animosity, or an opinion as to the guilt or innocence of the prisoner.

The following are instances of just grounds of objection:—

a. That the member is summoned to give evidence as to the facts of the case.

Should a member be objected to on the ground of being summoned as a witness, and should it be found that the objection has been made in good faith, and that the officer is to give evidence as to facts and not merely as to character, the objection should be allowed, whether made by the prosecutor or by the accused.

Should, however, it be found that the officer was summoned to give evidence without a sufficient cause, and merely to disqualify him from sitting, the court is to exercise its discretion in regard to allowing the objection. [Adm. Inst. 671, cl. 9.]

b. Officers who have been engaged in conducting an inquiry into the case.

Members of a court of inquiry are not disqualified to sit upon a court-martial upon the same subject matter, because they have so acted; but they may be objected to, and the objection allowed by the court, and this contingency is to be considered in selecting the members (*i.e.*, of the court of inquiry). [Adm. Inst. 699, cl. 5.]

c. Presumed or actual partiality on the part of the member.

d. Affinity to either party concerned.

e. The expression by a member of a desire as to the

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result of the trial, or of any personal animosity, or of an opinion as to the guilt or innocence of the prisoner.

f. That the member sat on a former court-martial, the sentence of which implied or contained an opinion adverse to the prisoner. In the case of a court-martial on the commander of H.M.S. "Pandora," in 1866, that officer objected to the whole court on this ground. The judge-advocate of the fleet held that his objection was valid, notwithstanding that the members were objected to collectively, and not each member separately.

Absence of members.

The president is responsible that adequate reason be assigned for the non-attendance of any officers who, by their seniority, are required to sit as members of the court. [Adm. Inst. 665, cl. 2, and 668, cl. 6.]

The following are adequate reasons for non-attendance:—

Through sickness.

a. Sickness. The court may require either the statement, or evidence on oath, of a medical officer that the officer is compelled by sickness to absent himself from his duty as a member of the court.

Quarantine.

b. Belonging to ships in quarantine. In this case the officers are debarred by law from leaving their ships. The fact that the quarantine flag is seen to be flying on board would be sufficient evidence to justify the court in taking "judicial notice" of the fact, and approving of their non-attendance.

Urgent duty.

c. Urgent duty requiring the presence of the officer elsewhere. In this case the officer who orders the court-martial should communicate in writing to the president the nature of the urgent duty. App. II., No. 11.

Leave of absence.

d. Leave of absence granted by the officer who ordered the court-martial. The fact of such permission having been granted is to be communicated in writing to the president. [Adm. Inst. 665, cl. 2.]

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Great discrimination should be exercised in granting leave of absence to probable members of courts-martial, so that the semblance of a selection of partial judges may be avoided.

Members absenting themselves.

Court must approve.

In the event of the services of members of protracted courts-martial being urgently required elsewhere during any stage of the trial, they may, under the approval of the other members of the court, be allowed to absent themselves, unless by their absence the number of members remaining would be reduced to less than four. [N. D. Act, s. 60.]

Under former Acts, much less elasticity was allowed in this respect. Act 19 Geo. III., c. 17, provided that "no member shall absent himself, except in case of sickness or other extraordinary and indispensable occasion."

Ships arriving and ships at a distant anchorage.

The president must decide whether officers of ships lying at a distant anchorage, or of ships appearing in sight before the formation of the court, shall be summoned to sit as members (cl. 16, s. 58). Officers of ships arriving after the court is formed are not required to attend. An officer may not take his seat as a member after the prisoner has been arraigned. Objections raised by the prisoner on account of the absence of any officers must be finally settled by the court (s. 62).

Prisoner's objection to constitution.

An important provision as to the constitution of courts-martial was introduced by the Naval Discipline Act of 1866.

Sec. 62 of that Act, after providing for objection by the prisoner to any of the members, enacts that :—

> The person charged may then raise any other objection which he desires to make respecting the constitution of the court-martial, and the objection shall then be decided by the court, which decision shall be final, and the constitution of the court-martial shall not be afterwards impeached, and it shall be deemed to have been in all respects duly constituted.

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Under former Acts, when, through the improper absence of a member or other cause, the court was not legally constituted, its proceedings were null and void, and the prisoner was liable to be tried again by a duly constituted court. Under the present Act the onus of raising any objections to the constitution rests upon the accused. Should he fail to object before the oath is administered to the members, the constitution cannot afterwards be impeached.

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CHAPTER VII.

PROCEEDINGS OF COURTS-MARTIAL.

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In arranging the following chapter endeavour has been made to work in strict sequence through the proceedings of the most simple form of trial, digressing only to explain such matters of usual occurrence as need it. But in many trials contingencies arise which call for some variation from the usual course of procedure. These variations have been collected and placed towards the end of this chapter, so that the inquirer may, without obscuring his view of the simple order of procedure, find the solution of his difficulties, so far as they can be foreseen and provided for, by consulting the above headings or turning to p. 97 and onwards.

To be held on board ship.

The Naval Discipline Act, s. 59, directs that a court-martial shall be held on board one of his Majesty's ships or vessels of war.

A special Act of Parliament (19 Geo. III., c. 6) was passed to enable a court-martial for the trial of Admiral

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Keppel to be held on shore, by reason of the infirm state of the admiral's health.

On home stations it is customary to hold courts-martial on board the flag-ship of the commander-in-chief, or other more convenient vessel; on foreign stations on board the ship which the president commands; but there is no binding regulation on the subject. It would not be proper to adjourn from one ship to another if the warrant for holding the court specified a certain ship.

Court to be public.

Courts-martial shall be assembled and held in the most convenient part of the ship, and be public, and all persons, except such as may be intended to give evidence, shall be admitted. [Adm. Inst. 670.]

Power of court-martial to imprison for contempt.

All persons present at a court-martial are bound to be orderly in their behaviour; if the conduct of any person be so disorderly as to amount to an interruption or obstruction of its proceedings, the court has power to order him to be excluded from the court, or in glaring cases to commit the offender (whether belonging to the navy or a civilian) for contempt.

It need hardly be observed that the power of committal should be exercised only in the utmost extremity, after the last measure of forbearance has been exhausted. Imprisonment for contempt is a rare occurrence before any tribunal. If a court conduct itself with dignity and temper, it will seldom fail to control and repress any attempts at insolence or disorder.

Clearing the court.

Whenever it may be considered necessary, in order to ascertain the opinion of the court on any matter, or for other purposes, the president may direct the court to be cleared. All persons present must then withdraw.

Admiralty to regulate procedure.

The Admiralty may from time to time frame general orders for altering and regulating (subject to the provisions of this Act) the procedure and practice of courts-martial under this Act; and any such general orders shall have full effect if and

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when approved by Her Majesty in Council, on a report of the Judicial Committee of the Privy Council, but not sooner or otherwise; and every Order in Council made under this section shall be laid before both Houses of Parliament. [N. D. Act, s. 65.]

The Admiralty Instructions, approved by Order in Council, govern the proceedings of courts-martial. The minor details are regulated by the "custom of the service." It is not within the power of the officer ordering the court-martial, or of any other authority, in any way to interfere with its mode of procedure.

Responsibility of president.

The president shall be responsible for the due constitution of the court and for the trial being conducted in accordance with the provisions of the Naval Discipline Act in force for the time being, with the general orders framed thereunder and with any supplementary orders given by the Admiralty. [Adm. Inst. 668, cl. 6.]

If a court sanctions a departure from the mode of procedure laid down by the Admiralty it incurs a responsibility which, except for good reasons, would be inadvisable. The mere request of the accused's adviser to alter the order of procedure, for example, by examining his witnesses before reading his defence would not be a valid reason.

To sit continuously.

A court-martial held in pursuance of this Act shall sit from day to day, with the exception of Sundays, until sentence is given, unless prevented from so doing by stress of weather or unavoidable accident, and its proceedings shall not be delayed by the absence of any member, so that not less than four are present. . . . [N. D. Act, s. 60.]

It will be observed that, under this section, the court is not empowered to adjourn for any purpose longer than from day to day, with the exception of Sundays. Should the prisoner be allowed longer than one day for the preparation of his defence, the court must formally assemble each day, and adjourn to the following day.

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There is nothing in the statute to preclude the court or its members from performing other work during the necessary adjournments. Such work might include sitting on another court-martial. [A. O. 17th Dec., 1886.]

The officer ordering the court-martial having directed the attendance of a sufficient number of officers to form a court, and to fill the vacancies of any members objected to, it is the duty of the president to ascertain that all officers, who by their seniority are required to sit, are present. For this purpose the commander-in-chief or senior officer at the port, or the officer who ordered the court, furnishes the president with a list of all the officers present at the place junior to the president whose rank requires them to sit, naming two spare officers who will attend, and accounting for absentees.

President to see that all members are present.

Officers take their seats according to their confirmed rank, the president at the head of the table, the second senior on his right, third on the left, and so on alternately; the judge-advocate at the bottom of the table.

Arrangement of court, &c.

The judge-advocate's end of the table should preferably be that which is nearer the entrance. If the prosecutor be then placed on the side of the president, towards the entrance; the provost-marshal, accused, and friend on the side of the judge-advocate away from the entrance; and the witnesses under examination on the side of the judge-advocate, towards the entrance; the inconvenience of traffic in the court will be reduced to a minimum.

Writing accommodation should be furnished for the prosecutor and for the accused or his friend.

Where the room permits, it is usual to provide a table for the press in the space allotted to the public.

Press.

The officers being seated, the judge-advocate reports the names of officers junior to the president who are absent on leave by permission of the convening authority or senior officer present.

Absence of eligible members.

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Officer of court's duties.

The officer of the court has charge of the witnesses. He will have received from the president instructions, as in Appendix II., No. 6, as to his duty in regard to them, and a list of their names, &c. Having mustered them outside the court, he now reports to the president that they are all in attendance, or as the case may be; but—

Witnesses.

Witnesses must not be present in court during any part of the proceedings, unless by permission of the court, except when under examination, and except when the court re-opens for reading the finding and the sentence. [Adm. Inst. 681.]

Accused.

The court being now provisionally assembled the accused is brought in by the provost-marshal.

Sword.

Should he be an officer, his sword is laid *across* the table.

Prosecutor.

The prosecutor is then admitted to his place in court, and the audience to the space allotted to the public.

The Admiralty have decided that it would be contrary to this article for a president to allow a case to be tried *in camera*. Ladies might be requested to withdraw, but the court must be, to all intents and purposes, an open one. This corresponds with the practice of the courts of law on shore.

Principles for president and prosecutor as to accused.

The principles laid down in the Army Rules of Procedure for the guidance of the presidents and prosecutors in military courts-martial, as to watching the interests of the accused, may well be taken as a guide by naval officers. That relating to the president is consonant with the orders for naval judge-advocates:—

59 (B) It is the duty of the president to see that justice is administered, and that the accused has a fair trial, and that he does not suffer any disadvantage in consequence of his position as a person under trial, or of his ignorance, or of his incapacity to examine or cross-examine witnesses or to make his own evidence clear or intelligible, or otherwise.

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60 (A) It is the duty of the prosecutor to assist the court in the administration of justice, to behave impartially, to bring the whole of the transaction before the court, and not to take any unfair advantage of, or suppress any evidence in favour of the accused.

And again :—The prosecutor is an officer for securing that justice is done, not a partisan to obtain a conviction, independently of the justice of the case.

Accused's friend.

The person to assist the accused now appears in Court.

2. Unless the person charged desires to conduct his own case, he may have a person or persons to assist him during the trial, whether an officer, legal adviser, or any other person. In case an accused person below the rank of officer should not obtain the help of any one for that purpose, it is to be considered part of the ordinary duty of the officer of his division, or detachment if he be a marine, to watch the case on his behalf, and assist him should he desire it.

3. In the event of the officer of the division or detachment being a witness for the prosecution, or unavailable, or ineligible for the duty for any other reason, the captain is to direct another officer to assist the accused. [Adm. Inst. 661.]

A person assisting an accused person may advise him on all points, may, by permission of the president, *but not otherwise*, on behalf of the accused examine and cross-examine witnesses other than the accused himself, may in every case, however, suggest to the accused questions to be put to witnesses, and may read the accused's defence, or statement in mitigation of punishment, but he is not to address the court. [Adm. Inst. 674.]

An officer senior to the president, and on full pay, should not act in this capacity.

Application for postponement of trial.

Now would appear to be the proper time for an application to the court for a postponement of the trial, either by the prosecution or the defence, on the ground of the absence of a material witness. It is presumed that the court would require affidavits in support of such an application, alleging the materiality of the testimony expected to be given by the absent witness, the cause of absence, whether occasioned by

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sudden illness, or some other reasonable impediment, and the impossibility of obtaining the attendance of the witness; this is the practice in the Criminal Courts of England. The Court may decide to proceed until it is actually necessary to take the evidence of the absent witness, and then adjourn if he has not arrived.

Opinion of court.

In taking the opinion of the court upon all questions, the junior member shall vote first, and then the other members, in order of seniority to the president, all voting orally; and the votes of the majority, except for judgment of death (which is specially provided for by section 53 (2) of the Naval Discipline Act) shall decide the question. Should the members disagree upon any question, and on a division the votes be equal, the construction most favourable to the prisoner shall prevail. (See also Art. 695.) [Adm. Inst. 691.]

When any question has been once decided, the decision is to be binding upon the whole court; but should he think fit, the president may require the members of the court to revise their votes, commencing with the junior member, the votes being taken orally as before. [Adm. Inst. 644.]

Opening proceedings.

The judge-advocate shall read the warrant for assembling the court, and the names of the officers whose attendance is stated in the list furnished under Article 665 (2) not to be attainable, together with the reasons for their absence. [Adm. Inst. 671.]

Absence of members.

In cases where exemption is desired on the ground of urgent duty, the captain of the ship to which the officer belongs should have represented the same to the officer ordering the court-martial in sufficient time to enable him to communicate in writing to the president the nature of the duty.

Medical evidence as to sickness.

In the event of the absence of any officer on the grounds of sickness, a medical officer cognizant of the case should have been directed to attend. The court may receive his verbal statement now, or it may require the testimony on oath: this latter can only be done after the court, judge-advocate, and shorthand writer, if any, have been duly sworn.

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Objections by prosecutor.

(2) The judge-advocate shall read the names of the officers composing the court, and shall ask the prosecutor whether he objects to any of them.

By prisoner.

(3) If the prosecutor shall have made no objection, or after any objection made by the prosecutor has been disposed of, the judge-advocate shall ask the prisoner if he objects to any member of the court.

Procedure on objection being made.

The following provisions shall apply to the case of objections both by the prosecutor and the prisoner.

No objection to judge-advocate.

(4) Neither the prosecutor nor the prisoner can object to the judge-advocate.

(5) Any member may be objected to on any ground which affects his competency to act as an impartial judge.

(6) Objections to members shall be decided separately, that to the officer lowest in rank being taken first. All the other members, whether objected to or not, shall vote as to the disposal of the objection.

(7) On an objection being allowed, the member is at once to retire, and his place is to be filled up before an objection against another officer is considered.

Objection to president.

(8) Should the president be objected to, and the objection be allowed, the court is to adjourn until a new president has been appointed by the convening authority.

Grounds of objection if summoned as a witness.

(9) Should a member be objected to on the ground of being summoned as a witness, and should it be found that the objection has been made in good faith, and that the officer is to give evidence as to facts, and not merely as to character, the objection should be allowed, whether made by the prosecutor or by the prisoner. Should, however, it be found that the officer was summoned to give evidence without a sufficient cause, and merely to disqualify him from sitting, the court is to exercise its discretion in regard to allowing the objection. [Adm. Inst. 671.]

Members eligible as witnesses.

A member of the court, whether previously objected to or not by either side, is not necessarily disqualified from being examined as a witness, should it be found in the course of the proceedings that he can give material evidence. [Adm. Inst. 681, cl. 3.]

Should there be more than one prisoner to be tried, each one should be separately asked whether he objects to being tried by any member.

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Objections to individual members of the court having been disposed of: Objections to constitution.

The judge-advocate shall then ask the accused whether he has any further objection to make respecting the constitution of the court. Should he raise any objection it shall then be decided by the court. [Adm. Inst. 672.]

To make clear the difference between the class of objections to members and that of objections to the constitution the following examples of the latter may be of assistance:—

(*a*) On the part of a commander. That there were not two commanders or other officers of higher rank, besides the president on the court.

(*b*) On the part of any person. That a certain acting-captain may sit only in his confirmed rank of commander, and that in that case the number of members of the court should not exceed five, whereas there were six members, including the said acting-captain. Or—

(*c*) That previous to the assembly of the court a certain ship had arrived, but that her captain, whose seniority required him to sit as a member, was not in attendance.

At this point it is customary for the members of the court and the judge-advocate to uncover, and to sit without their hats until the sentence is about to be pronounced. Hats.

(2) If the accused should have no further objection to make to the constitution of the court, the members and the judge-advocate shall then take the oaths in the manner prescribed by the Naval Discipline Act. [Adm. Inst. 672.] Swearing the court, &c.

The Naval Discipline Act, s. 63, directs that:—

Before the court shall proceed to try the prisoner, the judge-advocate of the fleet, or his deputy, or the person officiating as deputy judge-advocate of the fleet, shall administer to every member of the court the following oath; that is to say,—

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Member's oath.

"I do swear, that I will duly administer justice according to law, without partiality, favour, or affection; and I do further swear, that I will not on any account, at any time whatsoever, disclose or discover the vote or opinion of any particular member of this court-martial, unless thereunto required in due course of law. So help me God."

Sec. 64. As soon as the said oath shall be administered to the members of the court-martial, the president shall administer to the judge-advocate of the fleet, or his deputy, or the person officiating as deputy judge-advocate, the following oath:—

Judge-advocate's oath.

"I do swear, that I will not upon any account, at any time whatsoever, disclose or discover the vote or opinion of any particular member of the court-martial, unless thereunto required in due course of law. So help me God."

The Admiralty Instructions prescribe the following as the manner in which oaths shall be administered (peers being sworn as other members):—

Art. 679.—The person to be sworn shall take a book containing the Old or New Testament, as the case may be, in his right hand ungloved and shall distinctly and solemnly repeat after the judge-advocate the words of the oath, and after saying the words "So help me God," shall reverently kiss the Book.

Forms of oath.

(2) Except as hereinafter provided, all persons shall be sworn on the New Testament; the forms of oath to be made use of shall be as follows:—

For a witness:—

I, A.B., do most solemnly swear that in the evidence I shall give before the court on the present trial, I will, whether it be favourable or unfavourable to the accused, declare the truth, the whole truth, and nothing but the truth; so help me God.

For the accused:—

I, A.B., do most solemnly swear that the evidence I shall give on my own behalf shall be the truth, the whole truth, and nothing but the truth; so help me God.

For a shorthand writer:—

I, A.B., do most solemnly swear that I will truly take down, to the best of my power, the evidence to be given before this court-martial, and such other matters as I may be required, and, when required, will deliver to the court a true transcript of the same; so help me God.

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For an interpreter :—

I, A.B., do most solemnly swear that I will, to the best of my ability, truly interpret and translate, as I shall be required to do, touching the matter before this court-martial ; so help me God.

If witness a Jew.

(3) The invocation in the case of a Jew shall be "So help me Jehovah" and he shall be sworn on the Old Testament.

Scottish form of oath permitted.

(4) If any person to whom an oath is to be administered desires to be sworn with uplifted hand in the Scottish manner, he shall be thus sworn :—

He shall stand with his right hand raised above his shoulder and shall slowly and distinctly repeat the following words after the judge-advocate :—

I swear by Almighty God as I shall answer to God in the last great Day of Judgment that . . . .

proceeding with the words of the oath prescribed, omitting the words of invocation, and not making use of any book.

Affirmation permitted in certain cases.

(5) Any person upon objecting to be sworn on the grounds that he has no religious belief, or that the taking of an oath is contrary to his religious belief, may make his solemn affirmation as follows, slowly and distinctly repeating the words after the judge-advocate :—

I, A.B., do solemnly, sincerely, and truly declare and affirm that . . . .

and then proceed with the words of the oath prescribed, omitting the words of invocation and not making use of any book.

Other forms permitted.

680. In all cases where the above forms of oath are not binding on the conscience of the person to be sworn, such person shall be sworn in such form as he may declare to be binding on his conscience.

Effect of oath, &c.

Conscientious differences of opinion may exist as to the value of the religious oath, but there can be no question as to the moral and legal obligation to speak the truth at a judicial investigation ; and the oath, affirmation, or declaration, in whatever form, is a public acknowledgment of that obligation and of the declarant's acceptance of the legal consequences of perjury.

Spare members.

Spare members may be dismissed from attendance directly the Court is sworn.

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Each court to be sworn.

The oath taken by the members of the court or the judge-advocate is not sufficient in the event of the same members forming a second court-martial. So soon as the sentence of the first court is read, the president declares the court dissolved, and the members must be re-sworn before proceeding to a second trial.

Shorthand writers.

If a shorthand writer is to be employed he should now be sworn after the accused has been given an opportunity of objecting to his partiality. It is therefore convenient to quote from the Admiralty Instructions the regulations relating to interpreters and shorthand writers, though the former should not be sworn till their services are required.

Interpreter.

677. At any time during the trial, should the court think it necessary, or should either the prosecutor or the accused request it on any reasonable ground, an impartial person shall be sworn to act as interpreter.

Shorthand writer.

2. At any time of the trial, should the court think it desirable, an impartial person or persons may be sworn to act as shorthand writer, and duly sworn.

Objection.

678. Before a person is sworn as interpreter or shorthand writer, the accused should be informed of the person whom it is proposed to employ, and may object to such person as not being impartial; and the court, should it think such objection reasonable, shall not swear that person as interpreter or shorthand writer.

Evidence to be read over.

2. If a shorthand writer is employed, the evidence given by a witness shall, when required by the court or the witness, be read over to him by the shorthand writer before the witness leaves the court.

Transcript of minutes.

3. The transcript of the shorthand writer's notes, made and signed by him, and certified as such by the judge-advocate, shall constitute the original Proceedings of the Court.

Judge-advocate to supervise.

678a. In order to prevent any unauthorized publication of the proceedings, the transcribing of the notes is to be made under the supervision of the judge-advocate, and only one

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transcript is to be made, unless otherwise ordered by the court, and the notes, when transcribed, are to be delivered with the transcript to the judge-advocate, and are to accompany the proceedings when sent to the Admiralty.

Evidence as to sickness of member.

If evidence as to the absence of any member on account of sickness is to be given *on oath*, the medical officer should be sworn here, with the oath for a witness, and should then proceed to make his statement, or reply to any question put by the court or judge-advocate.

Reading charges and Circumstantial Letter.

Then follows the reading of the charges and the Circumstantial Letter by the judge-advocate; in effect the opening of the case for the prosecution.

Charges not to be withdrawn.

Generally speaking, the prosecutor should not be allowed to withdraw any of the charges, and the court should try the accused on all the charges preferred. But in cases where several charges of the same nature are preferred, *e.g.*, falsification of several men's accounts, and a sufficient punishment can be awarded on conviction on fewer, there is generally no objection, if the accused pleads guilty to one or more, to the prosecutor offering no evidence on the others. The court may then acquit the prisoner of those on which no evidence is offered.

Statement that prisoner has received copies of charge, &c.

The judge-advocate is to inform the court that the prisoner has been furnished with copies of the charges and circumstantial letter, with a list of the witnesses for the prosecution, and with a notice that it is competent for him to give evidence, subject to cross-examination by the prosecutor, and examination by the court.

Plea as to charges.

The judge-advocate then informs prisoner that he is not required to plead either guilty or not guilty; but that should he desire to plead guilty he should now do so, and should also lay before the court any statement in mitigation of punishment, and call witnesses as to general character.

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Plea against jurisdiction of court.

"The accused, before pleading to a charge, may offer "a special plea to the general jurisdiction of the court; "and, if he does so, and the court consider that anything "stated in the plea shows that the court have not jurisdic- "tion, they shall receive any evidence offered in support, "together with any evidence offered by the prosecutor "in disproof or disqualification thereof, and any address "by the accused and reply by the prosecutor in reference "thereto. If the court overrule the special plea, they "should proceed with the trial. If they allow the special "plea they should adjourn and report to superior "authority." [M. M. L. p. 473.]

The above extract from the military Rules of Procedure may serve as a guide to naval courts-martial. A plea to "general jurisdiction" challenges the right of the court to try the prisoner on any charge at all. It must not be confused with any plea as to the constitution of the court, nor with any plea relating to the particular charges which the court may be assembled to try.

Plea of "guilty."

The accused shall not be called on to plead to the charge or charges, but should he voluntarily plead guilty, his plea is to be recorded on the minutes. If the accused pleads guilty, he shall be deemed to have admitted the accuracy of all the material statements contained in the Circumstantial Letter. In such a case, before the court proceeds to deliberate on the sentence, the accused may make a statement in mitigation of punishment; if written, it must be signed by himself, and shall be read to the court, and attached to the proceedings. Should this statement in the opinion of the court amount to a plea of "not guilty," or should the court be satisfied by such statement, or by any other means, that the accused does not understand the effect of a plea of "guilty," or should the court be of opinion that the circumstances of the case are such that the proper sentence cannot be awarded unless the facts are investigated, such plea of "guilty" is not to be accepted, but the trial is to be proceeded with as if the prisoner had not pleaded. If, however, the statement is, in the opinion of the court, not inconsistent with a

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plea of "guilty," and if the court is satisfied that the accused understands the effect of such a plea and that no further investigation is required, such plea is to be accepted. [Adm. Inst. 675.]

Examples of inconsistent plea.

The following are given as examples of cases in which the accused should be advised to withdraw his plea of "guilty":—

Where, on a charge of desertion, he is willing to plead to desertion, but says that he meant to return; or, when charged with drunkenness, states that it was simply nervousness on being suddenly awakened that made it appear as if he had been drinking to excess; or, when pleading guilty to striking his superior officer, says that he did not mean to do it; or, where he alleges very great provocation to commit the offence charged; or, where he pleads guilty to receiving stolen property, but says that he did not know it was stolen; or where he desires to call witnesses or to make any defence whatever.

Proof of statement in mitigation of punishment.

Where the accused, on pleading guilty, states anything in mitigation of punishment which the court considers requires to be proved, and which if proved would affect the amount of punishment, the court may call witnesses to prove the same.

Allegations in accused's statement.

When an accused person, after pleading, and fully understanding the effect of his plea, addresses the court in mitigation of punishment and makes charges against other persons, it is not desirable that a court-martial should set such plea aside on account of the charges contained in the accused's statement, for there is nothing to prevent the Admiralty ordering an investigation of the allegations independently of the particular court-martial, or ordering a further court-martial, should it be advisable. [A. L. 20th May, 1886.]

Amendment of plea.

An accused person may be allowed to withdraw his plea of "not guilty" at any time during the trial, and substitute a plea of "guilty."

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Plea of "autrefois acquit or convict," or of pardon.

If the accused has been tried already for the same offence, he may, at this period of the proceedings, plead that he has been lawfully acquitted or convicted, as the case may be, of the offence alleged in the charge against him, or a pardon may be pleaded in bar. The true test by which the question may be tried whether such a plea is a sufficient bar in any particular case, is, whether the evidence necessary to support the second charge either would have been, or in fact was sufficient to procure a legal conviction on the first. It is sufficient that the same charge in substance should have been inquired into before a competent tribunal and a decision arrived at. The infliction or the revision of the sentence, or any informality as to avoiding the punishment, would not deprive the accused of his plea. It is sufficient that he has been placed on his trial and has been in jeopardy.

Proof of former trial.

The proof of this issue lies on the accused. To prove it, the original minutes of the former court-martial, or an examined copy of them, must be given in evidence; [1] or if the former trial was for an indictable offence in any of the criminal courts of the United Kingdom, it will be sufficient if a document be produced certified, or purporting to be certified, under the hand of the clerk of the court, or other officer having the custody of the records of the court where such conviction or acquittal took place, or by the deputy of such clerk or other officer, to be a copy of the record of the indictment, trial, conviction, and judgment, or acquittal, as the case may be, omitting the formal parts thereof.[2] If the court find that the plea is proved, it will record that finding and report to superior authority.

Summary punishment by commanding officer.

If the prisoner plead that he has been summarily punished by his commanding officer for the offence

[1] For this purpose an application must be made to the Secretary of the Admiralty, to whose custody the original minutes are consigned.
[2] 14 & 15 Vict. c. 99, s. 13.

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charged, the warrant under which he was punished should be called for, or if there were no warrant, evidence should be given that sentence was actually pronounced. Should the requirements as to signing or reading the warrant have been inadvertently not complied with, or should the commanding officer have subsequently cancelled his summary sentence, the prisoner would still be entitled to an acquittal. At a court-martial on board H.M.S. "Egmont," a private R. M. was tried for insubordination. The court having been informed that the prisoner had been sentenced by the captain of his ship to be imprisoned for twenty-one days for the same offence, three of which had already been undergone, adjudged him to be imprisoned for eighteen days, and to be discharged from the service as objectionable. The sentence was cancelled as illegal, the man having been already ordered to be punished for the same offence. [C. M. Sentences, 22nd Dec., 1869.]

Officers possessing powers of summary punishment must bear in mind, when making inquiries into a case of misconduct, that they are not to say or do anything which indicates that they have come to a conclusion as to the guilt of the accused unless they are prepared to deal with the matter themselves. The fullest investigation of the case may be made with a view to its remission to a superior officer if the investigating officer is in doubt about it, or if the offence merits a more severe punishment than he is allowed to award; but care must be taken to avoid any expression of opinion as to the man's guilt or innocence, since this would indicate clearly not only that the case has been investigated but also that the accused has been *tried*, thus rendering a further trial by superior authority irregular. [A. L., N. L. 13796/1910, 27th Feb., 1911.]

General issue of "not guilty."

When the prisoner, on being informed that he is not required to plead either guilty or not guilty, answers "Not Guilty," he is said to plead the general issue. Pleading the general issue does not necessarily imply that the prisoner contends that he did not do the actual

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deed in question, inasmuch as it does not prevent him from urging matter in excuse or justification. Moreover, this is practically the only way in which he can urge matter in excuse or justification. Thus, on a charge for murder, a man cannot plead that the killing was done in his own defence; he must plead the general issue—not guilty—and give the special matter in evidence. The pleading of the general issue lays upon the prosecutor the task of proving every material fact alleged in the charge; while the accused may give in evidence anything of a defensive character.

Examination of Witnesses.

If the accused does not voluntarily plead guilty, or if his plea of guilty is not accepted, the trial shall proceed, and the witnesses for the prosecution shall be called. No witness whose name was not included in the original list of witnesses shall be called by the prosecutor, unless the judge-advocate has given notice to the accused that he intends to call such witness.

This regulation does not fetter the right of the court to call any witnesses it thinks fit under the rules prescribed in Art. 682 (5). [Adm. Inst. 676.]

No witness shall be examined until he has been duly sworn in one of the forms laid down on p. 74. [Adm. Inst. 679.]

The oath must be administered to every witness, for whatsoever purpose called, whether to give medical evidence as to the absence of members, evidence as to character, identity of accused, &c., and applies equally to the prosecutor when he may have to give evidence.

Identity of prisoner.

The first points to be proved against the accused are his identity with the person named in the charge and that he was borne on ship's books at the date of the charge, and was therefore subject to the Naval Discipline Act and the jurisdiction of the court. The production of the ship's books to prove that the accused was subject to the Naval Discipline Act at the time when the charge or charges may be laid may be dispensed with

Subjection to Naval Discipline Act.

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when sufficient other evidence of the fact may be forthcoming.

A special witness may be necessary for the proof of identity, &c., but generally it will be convenient to cause that witness who will be called first for the prosecution to be prepared, from his personal knowledge, to identify the prisoner and, by a personal examination of the ship's books prior to the court-martial, to testify that the accused was borne on them at the date of the offence. If the prosecutor is to give evidence he will be the first witness to be called, and he then should be prepared to give the necessary evidence as to identity and subjection to the Naval Discipline Act. It is desirable in any case that the witness on these points should be an officer or petty officer.

Prosecutor as a witness.

The prosecutor is to be considered as a competent witness; but when there are other witnesses to the facts, his evidence shall be taken first. He may be recalled, for examination, or re-examination, by the court, or for cross-examination by the accused, during any part of the proceedings, but not for the purpose of giving evidence of any additional fact in support of the case for the prosecution. [Adm. Inst. 681, cl. 2.]

This regulation does not preclude the prosecutor from giving evidence as to the character of the accused, if so desired, during the defence.

Charges not to be read to witness.

The charges are not, on any account, to be read to witnesses either previous to, or during, their examination or cross-examination.

Examination to be oral.

The examination of all witnesses shall be oral, and except in the case mentioned in Article 683 shall be taken in the presence of the court. Unless a strong reason to the contrary exists, the evidence of witnesses shall be taken at one examination in regard to all the charges.

Order of examination, &c.

(2) The examination of all witnesses shall be conducted as follows:—First, they shall be examined by the person calling them; after which, they may be cross-examined by the opposite

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party should he desire to do so; then re-examined by the person calling them, but only on matter arising out of the cross-examination; and, finally, examined by the court and judge-advocate.

Postponement of cross-examination.

(3) On the application of the accused, the court should allow his cross-examination of a witness to be postponed, unless it should appear that the request has been made for the purpose of obstruction.

Court and Judge-advocate may ask questions;

(4) In addition to exercising the right of examination above conferred, the court and the judge-advocate may put questions to any witness at any period of his examination for the purpose of elucidating any answers previously given by him.

And may recall witness or call additional witnesses.

(5) The court, and the judge-advocate with the consent of the court, may at any time during the trial recall a witness; and may before the prisoner gives evidence or is called on for his defence also call and examine any other person touching the matter in question, whose evidence the court may deem necessary for the furtherance of the ends of justice. After the close of the case for the defence, they may call and examine any other person whose evidence the accused may show to the court to be material in his behalf, or any medical officer whose professional opinion as to the prisoner's condition the court may desire to have.

Prosecutor to call witnesses summoned if required by prisoner.

(6) The prosecutor is not bound to call all the witnesses whose names are on the list given to the accused, but he shall call such of them as the accused may desire to be called, in order that the accused may cross-examine them, if he wishes to do so. Such witness or witnesses shall be called before the prosecution is finally closed. [Adm. Inst. 682.]

All evidence to be produced.

In the case of a grave charge preferred against the master of the "Pandora," the Admiralty remarked that "it was the duty of the court, and especially of the president, to see that a searching inquiry was carried out, and that any evidence likely to throw light on the circumstances of the case, and the part in the transaction taken by the prisoner, should have been produced." [A. L. *L.*, 27th Feb., 1867.]

Adjournment for further evidence.

The court should not, however, as a rule, permit an adjournment for the purpose of obtaining further evidence on the part of the prosecution, and should only do so on

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behalf of the accused where they consider that he has not previously had sufficient opportunity for procuring his witnesses, or where it would be unjust to the accused not to so adjourn. [M. M. L. 498.]

Should a question proposed be objected to, the opinion of the court shall be taken, and the question shall be admitted or rejected as the majority may decide. The fact of the objection being made, the ground thereof, and the decision of the court, shall be recorded in the minutes. [See Adm. Inst. 684.] Objection to questions.

The prosecution having been closed, and the witnesses (if any) called by the court having been examined, the accused should be informed that the witnesses summoned by the prosecution but not called to give evidence may be called on his behalf. After their examination and his own if he applies to give evidence, and is the only witness for the defence, the accused is to be called on for his statement in defence, and a reasonable time shall be granted to enable him to prepare it, the court being adjourned accordingly. Defence.

The accused being ready, and the court re-assembled, the accused, his friend, or the judge-advocate, should read the "defence" by way of an opening. Should the accused prefer to make a verbal reply to the charge, instead of handing in a written statement, he may do so. The substance must be taken down in the minutes in the first person and as nearly as possible in the accused's own words. It may be read over as in the case of a written statement. If in writing, it must be signed by him. Verbal reply.

Whether handed in or dictated, the defence must be inserted in the minutes where it occurs. Insertion in minutes.

Considerable latitude is allowed to the accused in the matter of his defence; so long as nothing is introduced which is calculated to be injurious to the discipline of the service, or disrespectful or contemptuous to recognized authority, he should be allowed full freedom of Latitude in defence.

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speech. The president may caution the accused as to the irrelevance of his defence, but should not stop him unless he persists in disregarding the caution given to him.

Officers' certificates.

An officer may hand in his certificates either before proceeding to call his witnesses or at the close of his case; but when produced they must be read, verified, and inserted in the minutes. Unless the certificates contain anything likely to convey strong presumption that the accused's antecedents are incompatible with the offence charged, it would seem preferable to reserve them until the close of the case for the defence, when they will not be read till after the finding has been arrived at.

Testimonials withheld.

If an officer withhold from the court any of his certificates of service, the court would naturally infer that they contain nothing favourable to the accused.

Accused as witness.

As to the right of the accused to give evidence on his own behalf, see p. 390. If he is one of more than one witness for the defence, he shall be called to give his evidence immediately after the delivery or reading of his statement of defence. If the accused does not elect to give evidence himself, he reads his statement in defence, and then calls his witnesses.

When the accused has completed the examination of his witnesses, including those as to character, he hands his certificates, if he has not already done so, to the judge-advocate for production to the court after the finding.

Finding.

The court is then cleared to consider the finding.

After any necessary deliberation the finding should be arrived at in the manner laid down in Article 692 of the Admiralty Instructions, and in Article 691 as to taking the opinion of the court on all matters.

The judge-advocate shall collect the oral votes, on each charge separately, from the junior to the president, the votes of the majority deciding the issue except in the case of a sentence of death which is specially provided for by clause 2 of section 53 of the Act. When on a division

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the votes are equal the construction most favourable to the prisoner is to prevail.

Finding to rest upon the evidence.

The finding must rest solely upon the evidence which has been received by the court. It not unfrequently happens that the antecedents of the prisoner are known to members of courts-martial. In such cases it will be well to remember that "the law presumes a man to be innocent until the contrary is proved, in other words a man cannot be pronounced to have committed a crime without some evidence of it."

Members not to communicate their private knowledge to the court.

No communication to the court of facts within the private knowledge of a member should be permitted except he be sworn as a witness.

"It is now perfectly settled that a juror cannot give a verdict founded on his own private judgment; for it could not be known whether the verdict was according to, or against, the evidence; it is very possible that private grounds of belief might not amount to legal evidence. And if such evidence were to be privately given by one juror to the rest, it would want the sanction of an oath, and the juror would not be subject to cross-examination. If, therefore, a juror know any fact material to the issue, he ought to be sworn as a witness, and is liable to be cross-examined; and if he state such facts privately, it will be a ground of motion for a new trial."[1]

In matters of doubt safer to acquit than to condemn.

Legislators of almost every age and country have recognized the principle that although the punishment of guilt and the protection of innocence have in general an equal claim on the administration of justice, the latter should be the primary care of the law, and consequently, *in matters of doubt*, it is safer to acquit than to condemn. This should not be perverted to justify the acquittal of persons of whose guilt no reasonable doubt could exist.[2]

[1] 1 Starkie, Ev. 816, 4th ed. [2] Best, Law of Ev., 49, 95.

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Finding must be definite.

The finding of the court should be definite on all points; any failure in this respect may lead to an annulling of the sentence. [Adm. Memo., 29th Nov., 1862.]

"Not guilty."

Should the prisoner be found not guilty, the judge-advocate will at once proceed to draw up the finding accordingly, which shall be signed by every member of the court by way of attestation, notwithstanding any difference of opinion there may have been among the members, and be countersigned by the judge-advocate. The court shall then be re-opened, and the accused being present, the judge-advocate, by direction of the court, shall read the finding. [Adm. Inst. 692 and 693.]

The prosecutor, the audience, and all witnesses also are admitted at this time.

Hats and prisoner's sword.

It is customary for the members of the court and the judge-advocate to wear their hats during the reading of a finding. In the case of an officer, his sword is laid *along* the table with its hilt towards him if acquitted, and *vice versâ*.

Acquittal.

The reading of the finding constitutes the formal acquittal of the accused, whose sword, in the case of an officer, is handed to him by the president.

Court dissolved.

The president then declares the "court dissolved."

Finding of "Guilty."

If the accused is found guilty, the court, before awarding punishment, in addition to any oral evidence of general character that may have been adduced, shall take into consideration the following documents, which shall be read in open court—

a. In the case of an officer—

i. any entries against him in the list of officers who have been tried by court-martial;

ii. any previous entries against him in the log of the ship to which he may have belonged when the offence or offences for which he is being tried were committed, and also any documents, other than such entries in the log, of the nature of a definite censure by superior authority for a definite offence; which log and documents the prosecution is to produce;

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iii. any certificates or other documentary evidence of character which the accused may produce.

b. In the case of a person below the rank of subordinate officer—

i. the entries against him in the Conduct Book, or Company Conduct Sheet in case of a Marine, prior to the date of the offence charged but subsequent to his joining his present ship ;

ii. his certificate of service ;

iii. his Conduct Sheet, or the corresponding part of a Company Conduct Sheet in the case of a Marine, with character assessed from the previous 31st December to the date of the offence for which he may be under trial, but excluding all consideration of it. [Adm. Inst. 694.]

Antecedents of accused.

It will be seen from the above, that having arrived at a finding of "Guilty," in whole or part, the court is re-opened for the purpose of considering the previous history of the accused in regard to the punishment to be awarded. The documents taken into consideration, or copies verified in court, must be inclosed in their proper place in the minutes.

The court is not, at this stage of the proceedings, bound by the rigid rules of evidence. Any letters, certificates, &c., as to character, which the prisoner may be desirous of laying before it, may be considered previous to awarding sentence.

The court cannot originate any inquiry as to the previous character of prisoners, except as provided for by the production of the certificate, &c. It would be unfair to a prisoner, on conviction or pleading guilty, to produce evidence of former offences of which there was no record, and which he would be unprepared to defend. [A. L. *L. L. M.*, 3rd Dec., 1870.]

Punishment.

The court shall then be cleared, and the members shall consider and determine on the punishment proper to be inflicted in conformity with the finding. All the members of the court, whether they have voted for an acquittal or not, shall vote

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on the question of what punishment is proper to be awarded for the offence of which the accused has been found guilty. In the event of the votes varying so considerably as not to give an actual majority in favour of the award of any given punishment, the president shall call on the members to revise their votes. [Adm. Inst. 695.]

Sentence. The judge-advocate shall draw up the sentence in the prescribed form; it shall be signed by every member of the court by way of attestation, notwithstanding any difference of opinion there may have been among the members, and be countersigned by the judge-advocate. The court shall then be re-opened, and the accused brought in and the judge-advocate shall, by direction of the court, pronounce the sentence. The accused shall be removed and the court dissolved. [Adm. Inst. 696.]

The sentence ought always to be a subject of careful deliberation amongst the members of a court-martial. It is incumbent upon the court, in awarding punishment, to pay due regard to previous character, as well as to weigh carefully every circumstance of mitigation in the conduct of the accused during the course of the transaction which constitutes the offence of which he is found guilty. The extreme measure of punishment applicable to each offence is calculated for extreme cases: if an offence be characterized by no circumstance or aggravation, the punishment ought to be very considerably modified. Such is the invariable practice of the judges in the ordinary criminal courts, and such is the evident intention of the legislature in entrusting a court-martial with discretionary powers of so extensive a nature.

Former services to be considered. In awarding sentence, the court should take into consideration the former services and any other claims which the accused may lay before them, with a view to his being more leniently dealt with. It is objectionable for a court to award a sentence and then to recommend a prisoner to the favourable consideration of the Admiralty. Such a course throws a responsibility upon others which properly belongs to the court. [Adm. Order, 15th Oct., 1870.]

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Voting of members as to punishment.

The members register their votes on the question of punishment in the same manner as they do in the case of the finding: the junior members vote first; the judge-advocate collects the votes; the vote of the majority decides the question.

After any necessary revision of the votes, should they be equal, the sentence most favourable to the accused should be adopted. It is not permissible to take an average of the votes of the members (*e.g.*, in determining the period of imprisonment to be awarded), as by so doing the votes of the majority would be materially modified by the votes of the minority.

All members vote for punishment.

When the majority of members find the accused guilty, the verdict must be accepted as that of the court, and every member must vote for such punishment as he considers commensurate to the offence proved, even though he may not by his individual vote have concurred in the guilt of the prisoner. Sentence and punishment follow as the legal consequence of the finding.

The rule in the Army Procedure (69A) is that every member must give his opinion on every question which the court has to decide, and must give his opinion as to the sentence, notwithstanding that he has given his opinion in favour of acquittal.

And the Admiralty have laid it down that—

"The immemorial practice at all courts-martial has been, and necessarily must be, that all questions on which difference of opinion can arise should be decided by the votes of a majority of members.

"The first and most important question in framing the sentence of the court must be to determine the guilt or innocence of the prisoner; and when this question has been clearly and finally decided by a majority of the members, it becomes the obvious duty of the whole court to abide by that decision, and either acquit the prisoner, if declared innocent by a majority, or to award a proper

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punishment for the offence of which he may have been pronounced by a majority to be guilty.

"In the case of votes being equal, the construction most favourable to the prisoner is to be adhered to; but when once the opinion of a majority has been pronounced it becomes the plain duty of all the members of the court to consider the punishment most proper to be awarded to the offence which has been thus pronounced by the majority to have been proved." [A. L. *L.*, 24th July, 1860.]

The sentence. In drawing up the sentence, the following points should be attended to:—

1. To state clearly what parts of the charge or charges are proved, and what not proved. A convenient method of expressing this, when a charge is partly proved, is to state, "proved, with the exception of . . . ."

2. To state that the charges are proved on the confession of the prisoner, when such is the case. [A. L., 24th Oct., 1864.]

3. To record the acquittal of the prisoner of such charges, or parts of charges, as are not proved.

4. To award one sentence for all the offences of which the accused is found guilty.

5. To ascertain that the punishment awarded for such charges or parts of charges as are proved does not exceed that authorized by the Naval Discipline Act as the penalty for the offences of which the accused has been found guilty.

6. To ascertain that the punishment proposed to be awarded is applicable to the offender (sec. 53, cl. 11).

7. To limit the punishments to those laid down in sec. 52, and their duration to the extent authorized by sec. 53. All other punishments are illegal, and may not be carried out. It is beyond the power of the court to direct that an officer be placed on half-pay or be not employed again, that the value of articles maliciously destroyed be made good, &c., &c.

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8. To follow the wording of the Naval Discipline Act as closely as possible.

9. To confine the finding of the court specifically to offences of the same class as those charged, and not to extend it to offences of a different class, or those involving a greater degree of punishment. [N. D. Act, s. 48.]

10. To substitute no other punishment for the peremptory punishments laid down in sec. 2, 8, 5, and 28, for offences of a traitorous, scandalous, fraudulent, or unofficerlike character.

11. The date of commencement of sentence shall be the date on which judgment is passed, unless the accused is undergoing a previous sentence of court-martial, when, under sec. 73, Naval Discipline Act, it may commence from the expiration of such previous sentence.

12. To define clearly for what portion or portions, if any, of a term of imprisonment, hard labour is to be awarded. [N. D. Act, s. 53, cl. 9.]

Honourable acquittal.

It is competent to a court to record a verdict of honourable acquittal; but only in cases where the charges affect the honour of the accused, and where there is no stain whatever on his character.

Penalties involved in certain punishments.

In cases where punishments are awarded which necessarily carry with them certain penalties, it is not necessary to state those penalties in the sentence. Imprisonment of petty officers necessarily involves disrating, &c. (sec. 53, cl. 10); it may not be within the power of the court to decide to what rating a petty officer, whom they sentence to imprisonment, shall be disrated, as the rating to which he must be reduced depends upon his capabilities, which cannot always be determined by the court.

Effects of deserters.

In the case of deserters it is within the discretion of the court to give directions as to the disposal of the effects of the prisoner (sec. 19).

Unanimous verdict.

It is improper to state in the sentence that the members of the court are unanimous in their verdict, or in their

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judgment on any particular point. The object of the oath taken by the court is to prevent the vote or opinion of any particular member being divulged, and a general statement in the sentence which makes known the vote of every member of the court is evidently contrary to the spirit of the oath. In the court-martial on Admiral Randolph, in 1874, the Admiralty stated that: "An error was committed in announcing that the court came to a unanimous opinion, this course being contrary to the custom of service." [Adm. Minute, 10th July, 1874.]

Scale of punishment.

When a court-martial is called upon to determine the question of punishment at the conclusion of a trial, it must conform most strictly to the following rule, in accordance with which the discretionary powers of the court must be exercised:—

"Where any punishment is specified by this Act as the penalty for any offence, and it is further declared that another punishment may be awarded in respect of the same offence, the expression 'other punishment' shall be deemed to comprise any one or more of the punishments inferior in degree to the specified punishment, according to the scale herein-before mentioned; but corporal punishment shall be deemed equal in degree to imprisonment, and may in all cases, subject to the foregoing regulations, be inflicted as a substitute for or in addition to imprisonment." [N. D. Act, s. 55.]

Power of court to find intent.

Where the amount of punishment for any offence under this Act depends upon the intent with which it has been committed, and any prisoner is charged with having committed such offence with an intent involving a greater degree of punishment, a court-martial may find that the offence was committed with an intent involving a less degree of punishment, and award such punishment accordingly. [N. D. Act, s. 47.][1]

Power of court to find lesser offence.

Where any person shall be charged with murder, a court-martial may find him guilty of manslaughter or of a common

[1] At common law every attempt to commit a felony or misdemeanor is in itself a misdemeanor. So long as the act rests in bare intention it is not punishable. But if that intention be unequivocally manifested by some overt act, then it becomes an offence cognizable by the law. [Roscoe's Crim. Ev., p. 302.]

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assault; where he shall be charged with sodomy, a court-martial may find him guilty of an indecent assault; where he shall be charged with theft, a court-martial may find him guilty of an attempt[1] to thieve, or of embezzlement, or of wrongful appropriation of property belonging to another; and generally where any person shall be charged with any offence under this Act he may, upon failure of proof of the commission of the greater offence, be found guilty of another offence of the same class involving a less degree of punishment, but not of any offence involving a greater degree of punishment. [N. D. Act, s. 48.]

Under this section, persons charged with desertion (sec. 19) are frequently found guilty of breaking out of the ship (sec. 22), or of absence without leave (sec. 23).

Similarly, officers tried under sec. 28, on charges of cruelty or of scandalous or fraudulent conduct, might be acquitted of the cruelty or scandalous or fraudulent conduct, and found guilty under sec. 43 of acts to the prejudice of good order and naval discipline.

Misconduct of witnesses.

The Naval Discipline Act, s. 66, provides for the punishment of such naval witnesses (subject to that Act) as, after having been duly summoned, fail to attend, or prevaricate in their evidence, or behave with contempt to the court. The court is empowered summarily to imprison such witnesses for a term not exceeding three months in the case of non-attendance or prevarication, and not exceeding one month in case of contempt of court. It should be observed that no other punishment than imprisonment can be awarded for these offences (sec. 66). The proper mode of recording the award of such punishment is to include it *in* the sentence of the court-martial. [App. II.].

It is competent for a court-martial to record *after* the sentence their opinion that the evidence of a witness has been given in an unwilling or unsatisfactory manner; but it is not competent to award any punishment, whether a

[1] See note on p. 94.

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"reprimand" or otherwise, to any witness, except as already pointed out.

The court may also comment *after* their sentence on the censurable conduct of any individuals which may have been brought to their notice during the trial. No action for libel will lie for such remarks. [*Vide* p. 279.]

The Admiralty Instructions contain the following orders as to the disposal of the minutes of the court, which may be conveniently quoted here:—

Sentence to be reported to commander-in-chief.

As soon as the court has been dissolved, the president is to wait upon the commander-in-chief, or senior officer, with a letter reporting the finding and the sentence of the court-martial. [Adm. Inst. 696, cl. 2.]

Disposal of minutes.

Every judge-advocate, or deputy judge-advocate, or person officiating as deputy judge-advocate, shall transmit with as much expedition as may be the original proceedings, or a complete and authenticated copy thereof, and the original sentence of every court-martial attended by him, to the commander-in-chief or senior officer, who shall transmit them to the secretary of the Admiralty for the time being. [N. D. Act, s. 69.]

Minutes to be accompanied by certain documents.

The original minutes of the proceedings are always to be accompanied by the original documents which were taken into consideration by the court, or an attested copy, or extracts from them.

ii. In making up the proceedings the sheets are to be securely fastened together and numbered consecutively.

iii. All documents which accompany the minutes of proceedings of naval courts-martial (such as the warrant for holding the court, the charge sheet, the circumstantial letter, the accused's defence or statement in mitigation of punishment, the copies of the accused's certificates, the conduct or defaulters sheet, the extract from the conduct book, the original shorthand writer's notes and the transcript thereof, &c., &c.) are, if possible, to be inserted in their proper places in the minutes, in sequence with the record of what has gone before, so that the whole may be read in the exact order in which everything took place in court.

iv. In order to do this, it will frequently be found necessary to leave part of a page blank, in which case a line should be drawn transversely from left to right across the vacant space.

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v. If the senior officer present deem it expedient to send the original minutes of the proceedings direct to the Admiralty, the judge-advocate shall make a transcript of these documents and send it through the senior officer to the commander-in-chief; but in cases where the commander-in-chief may be required to carry the sentence into execution, the original proceedings are to be sent to him in the first instance, for transmission to the Admiralty in due course. Disposal of minutes.

vi. If the sentence, or any portion of it, should have to be carried into effect in England under the authority of the Admiralty, the original minutes should invariably be sent in time to get there before the person under sentence.

vii. The minutes of each particular court-martial are to be forwarded separately, except when more than one court may have been necessary for the trial of several persons for participation in the one and the same offence.

viii. The commander-in-chief shall in every case point out to the Admiralty any portion of the sentence or of the proceedings generally, which may appear to him of doubtful legality. [See also Art. 696 (3).] Representation of doubtful points.

In many trials contingencies arise which call for some variation from the straightforward routine of procedure. Some of these contingencies have a legal aspect, and may affect or even invalidate the proceedings if improperly dealt with; others are matters of form with no serious consequences attached to them. In either case the exercise of discretion, erring on the side of consideration for the accused's interests, will generally serve to steer a court clear of illegalities; but the following difficulties, with the rulings to which they have given rise, have been collected from past experience, and are given as guides in the event of their recurrence. Variations in procedure.

Should the president be absent from any cause, the court would be obliged to wait or to adjourn until his arrival or return, or until a new president were appointed; for, the warrant being addressed personally, no person other than the one named has any jurisdiction in the case. Absence—of the president:

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of the prosecutor: The absence of the prosecutor is a matter for the judgment of the court with regard to Article 664, clause 3 of the Admiralty Instructions. The court may call on another officer to conduct the prosecution, or proceedings may be conducted in his absence as directed by Article 668, clause 7; but a case having once been commenced by a prosecutor, proceedings in his absence are not advisable, and should not be allowed if it can be avoided.

of the judge-advocate: In the event of the sickness of the judge-advocate the court should adjourn until he is able to resume his duties, or until another judge-advocate is duly appointed, observing that sec. 61 of the Naval Discipline Act empowers the president, in certain circumstances, to appoint a judge-advocate, which might be a convenience and avoid undesirable delay.

of a member: A member of a court who may have been absent while any part of the evidence on the trial of a prisoner has been taken, can take no further part in the trial, but the court will not be affected except as provided by sec. 60 of the Naval Discipline Act. [Adm. Inst. 667.]

It is therefore a matter for the judgment of the members whether the court adjourn or not, unless the number of members be reduced below four, when it must adjourn or dissolve. It should be remembered that where a court dissolves before acquittal or sentence, the proceedings are null, and the prisoner is liable to be tried again. [M. M. L., p. 320, note.]

of the accused: It is a settled rule of law that no evidence is to be given against a prisoner but in his presence.[1] Therefore should the accused be prevented by sickness from attending the trial, the court must adjourn from day to day until his recovery; or should it appear that his sickness will probably be of long duration, a report to that effect

[1] 2 Hawkins, chap. 46.

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should be made in writing to the officer who ordered the trial; or, in his absence, to the senior officer present, with a view to the order for the court-martial being suspended or cancelled.

In the latter case the prisoner will be liable to be tried on a renewed warrant.

If any material witness should be in hospital, or otherwise unable from sickness to appear before the court, the court shall adjourn, and his evidence shall be taken on oath by a magistrate or consul, in the presence of the judge-advocate, of the accused, of the accused's adviser, should there be one, and of the prosecutor; so that full opportunity may be afforded of cross-examining the witness. The judge-advocate shall take down the evidence, as in the case of other witnesses, and on his return to the court shall lay before it the evidence which has thus been taken, and shall attach it to the minutes. [Adm. Inst. 683.] of a witness.

In all cases of absence through sickness of the individual concerned, medical evidence should be taken as to the necessity for such absence. Medical evidence as to absence from sickness.

If at any time in the course of a trial after the court has been sworn, but before the accused's guilt or innocence has been determined, the court shall be satisfied that there is a variance between the charge or charges and the evidence adduced, in support thereof, and shall consider that such variance is not material to the merits of the case, and that the accused cannot, by the amendment of the variance, be substantially prejudiced in his defence, it may direct the judge-advocate to amend the charge or charges; adjourning, if the court deem it necessary, for a reasonable time, to enable the accused to meet the charge or charges so amended. All such amendments shall be noted in the minutes, and shall be verified on the original documents by the signature of the president. [Adm. Inst. 690, and see p. 370.] Amendment of charges.

For example, a mistake in the date of the commission of an offence, or in the name or description of the

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accused, may be so amended, but no amendment can be made which has the effect of formulating a charge of a different nature to that on which the accused was first put on his trial.

Charges of loss, grounding, &c. H.M. ships.

If a court-martial should be ordered to inquire into the loss, stranding, or hazarding of a ship, or to try a charge arising therefrom, the following points, in addition to the customary investigation, are to be attended to when practicable :—

Special directions.

a. The ship's log book and deck log book ; the last table of compass deviations ; the subsequent observed deviations of the compass at sea, and the compass journal as directed in Article 1000 ; the captain's night order book ; the navigating officer's note book and work book ; and the chart or charts and sailing directions by which the ship was navigated, are to be produced.

b. The court shall ascertain whether the proper chart and all hydrographical notices bearing on the case had been supplied, and if so, whether they had been used ; whether the position of the ship had been fixed, if at sea, by means of observation at noon and at any later time, if in sight of land, by means of fixes by the land ; if not, when it was last ascertained so correctly that reliance should have been placed on it ; and whether the courses steered by standard compass, and the distances run between the time when the position of the ship was last correctly ascertained and that of the occurrence, were noted in the deck log book. The court shall also examine the compass journal to ascertain the degree of reliance that can be placed on the deviations of the standard compass.

c. The court shall direct one or more navigating or other competent officers of ships present to work up the ship's reckoning from the log and the navigating officer's note book and work book (Article 1023), and the rough and fair engine room registers, from the time when her position was last accurately ascertained (or from such a time and with such details as the court may require) to the time of her taking, or being in danger of taking, the ground ; the result is to be delivered to the court, attested by the signature of such officer or officers, and to its accuracy he or they are to be sworn and to be subject to cross-examination. The positions of the ship, so determined, are to be laid off on the chart by which

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she was navigated, and also the determined position when ashore or in danger, as noted in the log book. The rate and direction of the current and of the tidal stream, and the time of tide should also, if possible, be ascertained, stated, and equally verified on oath.

d. These documents, viz., the result and the chart, as well as an attested copy of the ship's log book and the engine room register, commencing from at least forty-eight hours before the ship took the ground or was in danger, if so long from a known anchorage, are to accompany the minutes.

e. The court shall inquire whether the regulations in Article 978, with regard to the use of the sounding machines and hand leads were carefully observed. [Adm. Inst. 686.]

The examination of the officer, or officers, who have been directed to perform the duty mentioned in Article 686c is to be limited to ascertaining the accuracy or inaccuracy of the document thus laid before the court. [Adm. Inst. 687.]

Cases having occurred in which letters or statements written by persons not called as witnesses have been admitted as evidence at courts-martial before the finding, the Admiralty came to the opinion that the absolute exclusion of such letters or statements may in certain circumstances be a source of hardship to the accused, and decided that affidavits or statutory declarations may be admitted by permission of the court for what they are worth, and gave effect to this decision in the following article of the Admiralty Instructions :—

686a. Sailing directions and similar documents which are issued officially for the information of the fleet are admissible in evidence for or against persons whose duties require them to be conversant with their contents.

(ii.) At courts-martial held under secs. 29 or 92 of the Naval Discipline Act, affidavits or statutory declarations made by officers or others having special local knowledge of navigation, may by permission of the court be put in evidence by the person or persons on trial, but not by the prosecutor. It

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should, however, be borne in mind that such statements have not been tested by cross-examination.

Attendance of a government official.

The public interest may occasionally demand that an official of a government department should be present during the proceedings of a naval court-martial. The president should afford him proper accommodation, but he should not be accorded any status on the court, or allowed to take any part whatever in the proceedings. [A. O. *L.*, 16th July, 1866.] Recent instances of this have occurred in cases of fraud by falsification of books and accounts, at the trial of which an official from the department of the Accountant-General of the Navy has attended the court to watch the case on behalf of his department with regard both to the offence itself and with a view to precautions against future recurrence.

Clerical error in sentence.

It has happened that by a clerical error an incorrect date has been inserted in a sentence of imprisonment. In the opinion of the judge-advocate of the fleet such error should be corrected as necessary, the alteration being supported by such a note as the following:—"1897 was written in error for 1898, which latter date is in accordance with the sentence pronounced, which has now been corrected as above" (signed by Officiating Deputy Judge-Advocate and initialled by President). [Adm., 28th Jan., 1898.]

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CHAPTER VIII.

DUTIES OF THE JUDGE-ADVOCATE.

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Special duties.

Many of the duties of the judge-advocate appear in the course of other chapters in this work; but it may be useful, in a separate chapter, to define his functions, and to enter into some details which would be out of place elsewhere. His duties are thus laid down in the Admiralty Instructions, Art. 669:—

Duty to accused.

The judge-advocate shall give notice in writing to the accused of the time and date of the trial, and that it is competent for him to give evidence on his own behalf. He shall also cause the accused to be furnished with a copy of the charges, circumstantial letter, the list of witnesses for the prosecu-

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tion, and, if the prosecutor should at a later stage desire to call any further witnesses, the judge-advocate shall give the prisoner immediate notice of his intention to do so. He shall also inform the accused that any witnesses whom he may desire to call shall be summoned on his behalf, and shall inform the president that he has performed these duties. The judge-advocate shall inform the prosecutor of the date and time of the court-martial and request him to forward certified copies (in the case of an officer) of any of the documents mentioned in Article 694 *a.* ii., and (in the case of a person below the rank of subordinate officer) of the documents mentioned in Article 694 *b.* i. He shall also forward to the prosecutor a copy of the charges if the charges submitted have been amended by the convening authority.

Report to president.

Duty to prosecutor.

To secure attendance of witnesses. N.D.A. s. 66.

Every person, civil, naval and military, who may be required to give evidence before a court-martial, shall be summoned by writing under the hand of one of the secretaries of the Admiralty, or by the deputy judge-advocate, or the person appointed to officiate as deputy judge-advocate at the trial . . . and every person not subject to this Act who may be so summoned to attend shall be allowed and paid his reasonable expenses for such attendance under the authority of the Admiralty, or of the president of the court-martial on a foreign station.

(2) The judge-advocate shall take the necessary steps to procure the attendance of the witnesses whom the prosecutor or the accused may desire to call, and whose attendance can reasonably be procured, serving them with a summons in the prescribed form under sec. 66 of the Naval Discipline Act. Should it appear that any witness has been summoned without due cause, the person requiring the attendance of such witness may, at the discretion of the Admiralty at home, or commander-in-chief abroad, be required to refund the cost of such attendance. Without prejudice to this provision, the payment of reasonable expenses of the witnesses not subject to the Naval Discipline Act, who may have been summoned to give evidence at a court-martial, shall be made by the judge-advocate, who shall be repaid under the direction of the president by the accountant officer of the flag or senior officer's ship at the port where the court-martial may be assembled; and the judge-advocate shall report to the secretary of the Admiralty the particulars of all such payments when the minutes of the proceedings are forwarded, or as soon after as may be.

Expenses of witnesses, how to be paid.

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(3) At all times after the judge-advocate has been appointed, the prosecutor and the accused shall, if they ask for it, be entitled to his opinion on any question of law relating to the charge or trial, subject, should he be in court, to the permission of the court. Duty to prosecutor and accused.

Whether consulted or not, he shall inform the convening authority and the court of any informality or defect in the charge, or in the constitution of the court. To call attention to defect in charge or constitution.

(4) The judge-advocate shall, whether his opinion is asked or not, advise the court to the utmost of his knowledge and ability, not only on questions relating to naval law and to the procedure of courts-martial, as they arise, but also on every question of doubt or difficulty with reference to common and statute law, to the law and rules of evidence, and to the rules and regulations of the service generally. To advise court.

Any information, advice, or opinion, given to the court on any matter before it, shall be entered in the proceedings, if he, or the court, desire it.

(5) The judge-advocate shall maintain an entirely impartial position. He shall not act as prosecutor. He shall take care that the accused does not suffer any disadvantage in consequence of his position as prisoner, or of his ignorance, or of his incapacity to examine or cross-examine witnesses, or of any other cause, and for that purpose, with the permission of the court, he may call witnesses and put such questions to any witness as may appear necessary to elicit the truth. To be impartial and protect prisoner.

(6) The judge-advocate shall be responsible for the due recording of the minutes in the prescribed form. He or the shorthand writer shall take down in writing and number consecutively the questions put to, and the answers given by each witness, and shall read the same in the hearing of the witness, when required to do so, in order that any mistake may be corrected. No erasures are to be made in the minutes, and all corrections or interlineations are to be verified by his initials. To take minutes in prescribed form.

. . . The judge-advocate of the fleet for the time being, or his deputy, or the person officiating as deputy judge-advocate, at any trial shall administer an oath to every witness appearing at the trial. To administer oath to witnesses. N.D.A. s. 61.

Before the assembling of the court, the judge-advocate should prepare a set of "Instructions for the Officer of the Court" in the form given at Appendix II., No. 6, ready Instructions for officer of court.

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for signature by the president. A list of all witnesses should be made on the back of the instructions, which should be given to the officer of the court as soon as he comes on board the court-martial ship.

Seniority list of members.

The convening authority will send to the president a list of the officers whose rank and seniority require them to attend the court, either to make up the necessary number, or as spare. Under sec. 58, cl. 16, of the Naval Discipline Act, it is the president who is ordered to summon the officers who should compose the court; but the officer ordering the court, or the senior officer at the place, gives the necessary notice in the first instance, and regulates the number of commanders and lieutenants who will be required. This would not absolve the president if anything went amiss, so that the judge-advocate should exercise a careful supervision over such preliminaries.

Officers absent.

The convening or senior officer will make any necessary communication to the president as to officers on leave, or likely to be absent on urgent duty; and if it be known beforehand that any officer will be absent through sickness, the judge-advocate may prevent delay (if the convening authority has not already taken the necessary steps) by reminding, or summoning, the proper medical officer to attend the court to give evidence as to the fact of the illness, either by an unsworn statement, or on oath if the court so require.

When no prosecutor.

In the event of there being no prosecutor, the court and judge-advocate shall ask such questions of the witnesses as may be necessary to bring the whole case fully before the court. [Adm. Inst. 668, cl. 7.]

Not to prepare the defence.

It should be observed that the judge-advocate's duties do not extend to preparing the prisoner's defence: this would not be compatible with the impartial attitude which he is directed to adopt.

Depositions of wit-

If any material witness should be in hospital, or other-

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wise unable from sickness to appear before the court, the court shall adjourn and his evidence shall be taken on oath before a magistrate or consul, in the presence of the judge-advocate, of the accused, of the accused's adviser should there be one, and of the prosecutor; and full opportunity shall be afforded of cross-examining the witness. The judge-advocate shall take down the evidence, as in the case of the other witnesses, and on his return to the court, shall lay before it the evidence which has thus been taken, and shall attach it to the minutes. [Adm. Inst. 683.] nesses in hospital.

If at any time in the course of the trial after the court has been sworn, but before the accused's guilt or innocence has been determined, the court shall be satisfied that there is a variance between the charge or charges and the evidence adduced in support thereof, and shall consider that such variance is not material to the merits of the case, and that the accused cannot, by the amendment of the variance, be substantially prejudiced in his defence, it may direct the judge-advocate to amend the charge or charges : adjourning, if the court deem it necessary, for a reasonable time to enable the accused to meet the charge or charges so amended. All such amendments shall be noted in the minutes, and shall be verified on the original documents by the signature of the president. [Adm. Inst. 690.] No amendment can be made which has the effect of formulating a charge of a different nature to that on which the accused was first put on his trial. Amendment of the charge.

In taking the opinion of the court upon all questions, the junior member shall vote first, and then the other members in order of seniority to the president, all voting orally, and the votes of the majority, except for judgment of death (which is specially provided for by sec. 53 (2) of the Naval Discipline Act), shall decide the question. Should the members disagree upon any question, and on a division the votes be equal, the construction most Ascertaining opinion of court.

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favourable to the accused shall prevail. [Adm. Inst. 691—see also 695.] It should be observed that this method is applicable to "all questions" : *i.e.*, the validity of the cause of members' absence, objections to members or to the constitution of the court, objections to questions, the finding as to guilt or innocence, the sentence, and generally any matters on which it is necessary to ascertain the opinion of the court when such opinion is not obvious without resort to the method described.

To lay all proofs before court.

"It is undoubtedly the duty of the judge-advocate that the proofs on the part of the Crown and the prisoner should be properly laid before the court; and when the point is doubtful, he should incline on the part of the prisoner." [1]

To object to improper evidence.

One of his most important duties is to object to the admission of improper evidence, and to point out to the court the irrelevancy of all such matters as may be adduced which do not tend to prove, either directly or consequentially, the charges under investigation.[2]

General summary

From the foregoing instructions it appears that the judge-advocate is the assessor of the court; it is his duty to advise the court on all points of law or practice which may arise, and to lay any suggestions before the court touching the conduct of the trial, which may appear to him conducive to the ends of justice.

Not to express opinion as to guilt, &c.

The judge-advocate should not express an opinion as to the guilt or innocence of the prisoner or the amount of punishment to be awarded to him. It is his duty to advise the court on the legality or sufficiency of the evidence, and to take care that all legal details are strictly observed; but he is in no manner responsible for the adequacy or inadequacy of the sentence.

Questions of doubt or difficulty.

Should any legal or other question of great doubt and difficulty arise during the trial, it would be the duty of

[1] Bathurst, J., quoted by McArthur on C.-M.
[2] Kennedy, quoted by Hughes, Duties of J.-A., ch. 6, 16.

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the judge-advocate (after advising the court as to their judgment at the time) to lay the point before the president for transmission through the proper channel to the Admiralty, for the consideration and ultimate determination of the Board and their legal advisers.

But should an immediate decision on any such question be necessary to enable the trial to proceed, and the court and judge-advocate be unable to decide the point at issue, it would be proper to adjourn for the purpose of obtaining the instruction of the authority which ordered the court.

What opinions, &c., to be recorded.

The judge-advocate should enter on the minutes only the formal proceedings of the court, and not any mere memorandum of his own. Opinions expressed by the judge-advocate on questions of law put to him do form part of such formal proceedings and are therefore proper to be put into the minutes. The president of the court, as such, would be justified in ordering the exclusion from the minutes of any matter improperly proposed or inserted. It is the duty of the judge-advocate to insert such questions as are actually put and answered, although objectionable as evidence. He may, of course, advise the members of the court against putting questions which appear to him to be irrelevant or calculated to mislead.

Applicability of common law.

Members of courts-martial should recollect "that in all matters touching the trial of crimes by court-martial, whereon the military law is silent, the rules of the common law of the land (to the benefit of which all British subjects are entitled for the protection of life and liberty) must of necessity be resorted to.[1]

Record of sentence on witness.

If the court shall pass sentence on any witness under sec. 66 of the N. D. Act, such sentence shall be embodied *in* the general sentence of the court; but if the court only draws attention to the conduct, or manner of giving

[1] Tytler, Essay on C.-M. 359.

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evidence, of any witness, a notation shall be made *after* the sentence.

Not to furnish copy of proceedings.

The judge-advocate is on no account to furnish copies of the proceedings in whole or in part to any person whatever. [A. O., 26th Mar., 1812.]

Copy of proceedings can be obtained.

Any person tried by a court-martial shall be entitled, on demand, to a copy of such proceedings and sentence at any time not sooner than six months after the trial if the same takes place in the Mediterranean, three months if at any other naval station within Europe, and twelve months if elsewhere (upon payment for the same at the rate of fourpence per folio of seventy-two words), but no such demand shall be allowed after the space of three years from the date of the final decision of such court. [N. D. Act, s. 69.] Application for a copy of proceedings must be made to the secretary of the Admiralty. No person other than the prisoner is entitled to demand a copy of them.

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CHAPTER IX.

THE JURISDICTION OF COURTS-MARTIAL.

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Jurisdiction of naval courts-martial.

The legality of every court depends upon its jurisdiction. The jurisdiction of a naval court-martial is derived from the Naval Discipline Act and from the Acts quoted on pp. 114—116; and such a court is bound in every instance to take care that the case before it is within the statutable jurisdiction. Want of jurisdiction in a court-martial renders all its proceedings absolutely void: an objection to the jurisdiction may be taken at the trial, or enforced after sentence by application to the superior courts. See Chaps. VII. and XIV.

Want of jurisdiction.

Limits of jurisdiction.

The question as to the limits of jurisdiction resolves itself into three branches:—

1. Whether the offender at the time of the commission of the offence was a *person* subject to the provisions of the Naval Discipline Act, or of the other Acts quoted above.

2. Whether the offence was committed at a *place*

and

3. At a *time*

within the limits prescribed by the same Act, or Acts.

1. *Jurisdiction as to Person.*

The persons subject to the Naval Discipline Act are specified in the following sections thereof:—

Spies.

(*a*) 6. All spies for the enemy shall be deemed to be persons subject to this Act, and shall suffer death or such other punishment as is herein-after mentioned.

Persons seducing from allegiance.

(*b*) 13. Every person, not otherwise subject to this Act, who, being on board any ship of her Majesty, shall endeavour to seduce from his duty or allegiance to her Majesty any person subject to this Act, shall so far as respects such offence be deemed to be a person subject to this Act, and shall suffer death or such other punishment as is herein-after mentioned.

Persons borne on ship's books.

(*c*) 87. Every person in or belonging to her Majesty's navy, and borne on the books of any one of her Majesty's ships in

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commission shall be subject to this Act; and all other persons hereby made liable thereto shall be triable and punishable under the provisions of this Act.

Land forces embarked.

(*d*) 88. Her Majesty's land forces, when embarked on board any of her Majesty's ships, shall be subject to the provisions of this Act to such extent and under such regulations as her Majesty, her heirs and successors, by any Order or Orders in Council, shall at any time or times direct. [*Vide* p. 117.]

Passengers.

(*e*) 89. All other persons ordered to be received or being passengers on board any of her Majesty's ships shall be deemed to be persons subject to this Act, under such regulations as the Admiralty may from time to time direct. [*Vide* Art. 726, Adm. Inst. and p. 120.]

Crews of hired vessels

(*f*) 90. With respect to hired vessels in her Majesty's service in time of war, being either armed or under the command of an officer in her Majesty's naval service, the following provisions shall take effect if in any case the Admiralty think fit so to direct, and where such direction is given the same shall be specified in the ship's articles:

(1) Every person borne on the books of any such hired vessel shall be subject to this Act:

(2) Any offence committed by any such person shall be tried and punished as the like offence might be tried and punished if committed by any person in or belonging to her Majesty's navy, and borne on the books of any of her Majesty's ships in commission:

(3) Every such offender who is to be tried by court-martial shall be placed under all necessary restraint until he can be tried by court-martial:

(4) On application made to the Lords of the Admiralty, or to the commander-in-chief, or senior officer of any of her Majesty's ships or vessels of war abroad authorized to assemble and hold courts-martial, the Lords of the Admiralty, commander-in-chief, or senior officer (as the case may be) shall assemble and hold a court-martial for the trial of the offender:

(5) The officer commanding every such hired vessel shall have the same power in respect of all other persons borne on the books thereof, or for the time being on board the same, as the officer commanding one of her Majesty's ships has for the time being in respect of the officers and crew thereof or other persons on board the same:

(6) The naval commander-in-chief and senior naval officer in

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her Majesty's service shall have the same powers over the officers and crew of every such hired vessel as they have for the time being over the officers and crew of any of her Majesty's ships.

Crews of wrecked ships of war.

(*g*) 91. When any one of her Majesty's ships shall be wrecked or lost or destroyed, or taken by the enemy, such ship shall, for the purposes of this Act, be deemed to remain in commission, until her crew shall be regularly removed into some other of her Majesty's ships of war, or until a court-martial shall have been held, pursuant to the custom of the navy in such cases, to inquire into the cause of the wreck, loss, destruction, or capture of the said ship.

ROYAL MARINES. A corps in the regular forces.

(*h*) The legal position of the Royal Marines with regard to the N. D. Act requires special elucidation. By the terms of the Army Act they are a "corps," and part of the "regular forces." They are liable to serve on board ships of the Royal Navy, and the following modifications in the application to them of the Army Act are made by sec. 179 thereof:—

Admiralty power over.

1. Nothing in this Act shall prejudice any power of the Admiralty to make articles of war for the Royal Marines or otherwise prejudice the authority of the Admiralty over the Royal Marines. * * *

When subject to Naval Discipline Act.

15. Officers and men of the Royal Marines, during the time that they are borne on the books of any ship commissioned by her Majesty (otherwise than for service on shore), shall be subject to the Naval Discipline Act, and to the laws for the government of officers and seamen in the Royal Navy, and to the rules for the discipline of the Royal Navy for the time being, and shall be tried and punished for any offence in the same manner as officers and seamen in the Royal Navy.

Provided that—

Exceptions.

(*a*) The last-mentioned provision shall not prevent the application of this (Army) Act to any person dealing with or having any relations (*i.e.*, contrary to sec. 156) with any such officer or man of the Royal Marines, or to any such officer or man if found on shore as a deserter or absentee without leave; and

(*b*) If any such officers or men of the Royal Marines are employed on land, the senior naval officer present may, if it seems to him expedient, order that they shall, during such employ-

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ment, be subject to military law under this Act, and while such order is in force they shall be subject to military law under this Act accordingly. (This refers to lengthened employment amounting to an expedition, and not to the mere landing of marines for a temporary purpose. [M. M. L. p. 427.])

Amenability to Army Act of embarked Marines.

16. If any officer or man of the Royal Marines who is borne on the books of any ship commissioned by her Majesty commits an offence for which he is not amenable to a naval court-martial, but for which he can be punished under this Act, he may be tried and punished for such offence under this Act. (Marines serving in ships on home stations are not to be disembarked for trial without Admiralty authority. [A. L. *L. L. M.*, 6th July, 1877.])

Admiralty discretion as to amenability.

17. The Admiralty may direct that an officer or man of the Royal Marines may be tried under this Act for any offence (punishable under the Army Act) committed by him on shore, whether he be or be not amenable to a naval court-martial for such offence, or be or be not borne on the books of any ship commissioned by her Majesty.

When borne afloat for service on shore.

18. Where any officer or man of the Royal Marines is on board any ship commissioned by her Majesty, but is borne on the books thereof for service on shore, he shall be subject to the Naval Discipline Act, to such extent and under such regulations as her Majesty by Order in Council from time to time directs, and, so far as she does not so direct, as is for the time being directed by Order in Council with respect to the other regular forces.

Order in Council of 6th February, 1882, framed under the above section, provides that "on all occasions on which Royal Marines are embarked on board one of her Majesty's ships, whether as part complement, supernumeraries, or in battalions for service on shore, they shall be subject to the provisions of the Naval Discipline Act, provided the directions contained in sub-clause (*b*), clause 15 of sec. 179 of 'The Army Act' (see *ante*, p. 114) are not infringed."

Articles 1133, 1134, and 1135 of the Admiralty Instructions also deal with the discipline of Royal Marines on board his Majesty's ships.

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Other classes subject to naval discipline.

The following classes also are made subject to naval discipline by the enactments named :—

(*i*) Officers and men of revenue cruisers, seamen riggers, pensioners, and other persons, when required to serve in the navy. [Act 16 & 17 Vict. c. 73.]

(*k*) Officers and men of the Royal Naval Reserve (formerly called the Royal Naval Volunteers), including the Royal Fleet Reserve, when under training or called out for service in the fleet. [Act 22 & 23 Vict. c. 40, and Act 63 & 64 Vict. c. 52.]

In respect to pensioners and R.N.R. men who neglect, or refuse, to appear when called out, these classes are liable to be tried by court-martial and punished as deserters from her Majesty's navy, under the Acts referring to them respectively, notwithstanding that they would not have joined nor been placed on the books of the ships to which they were appointed within the meaning of sec. 87 of the N. D. Act. [A. L. *L.*, 18th May, 1892.]

(*l*) Royal Indian Marine. [Act 47 & 48 Vict. c. 38.]

(*m*) Colonial Defence Forces. [Act 28 & 29 Vict. c. 14.]

Foreigners serving in the navy.

(*n*) Foreigners who may be allowed to serve in the navy as bandsmen, domestics, &c., and who are borne on ship's books, are subject to the Naval Discipline Act.

Persons on books of H.M. ships.

The great proportion of persons triable by naval courts-martial are comprised in class (*c*), and two incidents are absolutely necessary to bring a person of that class within the terms of sec. 87.

1st. That he must belong to the navy.

2ndly. That he must be borne on the books of one of his Majesty's ships in commission at the time of committing the offence.

Coastguard.

The officers and men of the coastguard, being all borne on ship's books, are included in this class.

Officers on half pay.

But officers of the Royal Navy on half pay are not subject to the Naval Discipline Act, and they do not

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become subject thereto until, having taken up an appointment, their names have been placed on the books of the ship for pay.

Actual employment on board not necessary.

If the name of an offender be borne on the books of a ship in commission, it is not necessary that he should be actually employed in that ship, or on any duty connected with it, at the time that the alleged offence is committed. Thus, upon a question whether an officer was amenable to the jurisdiction of a court-martial under the repealed Act of 22 Geo. 2, c. 33, as being *in the actual service of his Majesty's fleet*, it appeared that Captain Christie held two appointments, one a commission as an additional captain of the "Fisgard" at Woolwich, the other a warrant appointing him principal agent for transports at Balaclava; the charges had reference to his latter office, and when he was in the service of that office. It was held that he was within the Act, *as he was borne on the books of the "Fisgard,"* and the service was a service in the fleet; distance could not affect the decision of the question; the case did not differ in principle from one where by Admiralty warrant an officer of the Black Sea fleet was directed to take upon him duties of a description not usually performed by a naval officer, for there are no known limits to the duty which the Crown may impose upon an officer in the naval service.

Captain Christie's case.

Land forces embarked.

Under the authority of sec. 88 of the Naval Discipline Act, the following Order in Council, dated 6th February, 1882, provides for the discipline of land forces embarked:—

"1. Whenever any of your Majesty's land forces shall be embarked as passengers in any of your Majesty's ships, the officers and soldiers shall, from the time of embarkation, strictly observe the laws and regulations established for the government and discipline of your Majesty's navy, and shall, for these purposes, be under the command of the commanding officer of the ship, as well as of the senior naval officer present; and all military officers or other persons, under the equivalent rank of

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captain of your Majesty's navy taking passage, and all military officers in actual command for the time being of any of the troops embarked, through whom orders to the troops (given by the officer of the watch) are required to pass, shall be under the command of the officer of the watch.

"2. Any act against the good order and discipline of the ship shall be deemed an act to the prejudice of good order and military discipline under the 40th section of the Army Act, 1881, unless the breach of discipline constitutes some other military offence for which provision is otherwise made in the said Act.

"3. Whenever an officer or soldier commits any act against the good order and discipline of the ship, the commanding officer of the ship may, by his own authority, and without reference to any other person, cause him to be put under arrest or confined as a close prisoner; and may, if he thinks the case requires it, order the prisoner to be disembarked at the first convenient opportunity, transmitting a report in writing through the senior naval officer present, to the senior military officer in command of the land forces, in order that the offender may be brought before a military court-martial.

"4. The commanding officer of the ship shall have full power, on his own authority, to order an offender, whether officer or soldier, to be placed in either naval or military custody, as he shall consider most desirable, observing that in all cases where an offender is to be disembarked for trial by military authority, he must be placed in military custody on board the ship.

"5. If any officer or soldier commits any act which, in the opinion of the commanding officer of the troops, can only be adequately dealt with by a general or district court-martial, the offender shall, with the concurrence of the commanding officer of the ship, be disembarked on the first opportunity for the purpose of being proceeded against according to military law.

"6. If any private soldier shall commit any act against the good order and discipline of the ship, which in the opinion of the commanding officer of the ship requires the infliction of any summary punishment for which a warrant is required by the Summary Punishment Table attached hereto, and which he is hereby authorized to award, the commanding officer of the ship shall confer with the commanding officer of the troops as to the nature and amount of such punishment, if any, to be inflicted, and on their concurrence the commanding officer of the ship shall, by warrant under his hand, which should also bear the signature of the officer commanding the troops as concurring,

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sentence the offender to suffer such punishment accordingly. In the event of the commanding officer of the troops not concurring with the commanding officer of the ship, the commanding officer of the ship is to cause the offender to be placed under arrest or confined as a close prisoner, until the case can be referred to superior military authority.

"7. If any non-commissioned officer shall commit an offence which, in the opinion of the commanding officer of the ship and the officer commanding the troops, does not require trial by general or district court-martial, the commanding officer of the ship may, by an order in writing, authorize the officer commanding the troops to convene a regimental court-martial for the trial of such non-commissioned officer, and thereupon the trial may proceed and the finding and sentence may be confirmed in all respects as if the court had been convened and the sentence had been passed in the United Kingdom.

"Provided that no sentence of any such regimental court-martial shall be carried into execution on board any of your Majesty's ships until the commanding officer of the ship has, by an order in writing, expressed his concurrence in the said sentence, and directed that it may be carried into effect.

"If the commanding officer of the ship shall see fit to withhold the last-named order in writing, the confirming officer shall suspend the execution of the sentence until the disembarkation of the prisoner.

"Whenever such regimental court-martial is held on board, the captain of the ship is to report immediately by special letter on each case to the Admiralty, a copy of which letter shall accompany the quarterly returns of punishment.

"8. The commanding officer of the troops, on his taking command of the troops embarked, will receive from the captain of the ship authority under his hand, and in the established form, to award such summary punishments as are specified in the Summary Punishment Table for the military, but such authority will not deprive the captain of his right to withdraw the original authority given; in the latter case, however, he should report to the Admiralty the circumstances which induced him to deviate from the general rule.

"9. All orders to the troops are, so far as may be practicable, to be given through their own officers and non-commissioned officers, and the commanding officer of the ship is to bear in mind that although the discipline of all on board is under his entire control, he is nevertheless to leave the troops to the

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management of their own officers, so far as may be consistent with the order and discipline of the ship.

"10. In special and exceptional cases where the commanding officer of the ship may deem it necessary for the good order or discipline of the ship, to give such orders as may interfere with existing regulations, or may affect the internal economy and discipline of the troops embarked, he is to make a special report of the circumstances to the Admiralty.

"11. When any soldiers of your Majesty's land forces are embarked as passengers in any of your Majesty's ships, and there is no commissioned officer of the land forces on board, the commanding officer of the ship shall possess and may exercise in regard to any such soldiers all the powers conferred upon him by Article 6 in the case of private soldiers, without conferring with or obtaining the concurrence or signature of any officers of your Majesty's land forces.

"12. All summary punishments for soldiers embarked on board your Majesty's ships shall be in strict accordance with the Summary Punishment Table appended to this Order in Council.

"13. Military convicts and military prisoners when embarked on board your Majesty's ships for passage shall be kept in military custody."

Passengers in H.M. ships.

The following are the Admiralty Regulations regarding passengers, framed under sec. 89 of the Naval Discipline Act:—

a. Any person, although not belonging to his Majesty's naval or military services, who, while on board one of his Majesty's ships as a passenger, shall commit any offence against the good order and discipline of the navy, may be placed under such restraint, by the officer in command of the ship in which he has embarked, as the offence or offences committed by him may appear to justify or render necessary:—and the officer who has occasion to place any such passenger in arrest, shall take the earliest opportunity that presents itself of reporting the circumstances to the first senior officer he may fall in with, in order that it may be determined, after due investigation, whether the alleged offender shall be released from arrest, or continue in arrest until the termination of the voyage for which he is embarked, or whether he shall be transferred to some other ship; but passengers who shall be guilty of the offences specified in secs. 6 and 13 of the Naval Discipline Act, shall be tried

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by naval court-martial, and punished according to the provisions of the said Act.

b. If any passenger, while on board one of his Majesty's ships, shall commit any criminal offence, punishable by the laws of the United Kingdom, he may also be kept under such restraint as is necessary, until an opportunity shall offer of delivering him over to a civil tribunal competent to try him for the same.

c. Officers, petty officers, seamen, marines, and boys, who, upon being invalided or discharged, may be ordered or permitted to take passage in any of his Majesty's ships, and prisoners sentenced under the Naval Discipline Act, so long as they are borne on the books of the ship in which they are embarked as passengers, shall be deemed to be persons in and belonging to his Majesty's navy, and shall be subject, in every respect, according to their several ranks and ratings, to the Naval Discipline Act in force in so far as that Act relates to the trial and punishment of offenders. [Adm. Inst. 726.]

Men in naval prisons.

Persons, otherwise subject to the Naval Discipline Act, cease to be so subject when undergoing sentences in naval prisons, and therefore they may not be tried by court-martial for offences committed there: such may only be dealt with as breaches of prison discipline [C. M. Sentence, 1st Oct., 1884]; but persons undergoing sentences of detention in detention barracks or quarters remain borne on ships' books, and may be tried by court-martial if they commit offences more grave than breaches of detention barracks discipline.

2. *Limits of Jurisdiction as to Place.*

Jurisdiction as to place.

The limits of jurisdiction as to *place* are fixed by sec. 46 :—

"For all offences specified or referred to in this Act, if committed by any person subject thereto in any harbour, haven, or creek, or on any lake or river, whether in or out of the United Kingdom, or anywhere within the jurisdiction of the Admiralty, or at any place on shore out of the United Kingdom of Great Britain and Ireland, or in any of her Majesty's dockyards, victualling yards, steam factory yards, or any gun wharf, or in any arsenal, barrack, or hospital belonging to her Majesty, whether in or out of the said United Kingdom, the offender may be tried

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and punished under this Act, and for all offences herein-before specified under the headings 'Misconduct in the Presence of the Enemy,' 'Communications with the Enemy,' 'Neglect of Duty,' 'Mutiny.' 'Insubordination,' 'Desertion and Absence without Leave,' or 'Miscellaneous Offences,' if committed by any person subject to this Act at any place on shore, whether in or out of the said United Kingdom, the offender may be tried and punished under this Act."

It will thus be seen that all offences mentioned in sec. 2 to 44 of the Act committed *anywhere* by persons subject to the Act, may be tried and punished by court-martial; and that the offences mentioned in sec. 45, if committed anywhere out of the United Kingdom, or in any harbour, haven, or creek, or on any lake or river, or anywhere within Admiralty jurisdiction, or in any of his Majesty's establishments mentioned in sec. 46, whether in or out of the United Kingdom, may be tried and punished by court-martial; but that offences against sec. 45 committed elsewhere, may not be tried under the Naval Discipline Act.

Classification of places.

The places in which the commission of any offences specified, or referred to in the Naval Discipline Act, brings any person subject thereto within the jurisdiction of a naval court-martial, may be classified under the following heads:—

1. Any harbour, haven, or creek, or any lake or river, whether in or out of the United Kingdom.
2. Any locality within the jurisdiction of the Admiralty.
3. Any place on shore out of the United Kingdom of Great Britain and Ireland.
4. Any of his Majesty's dockyards, victualling yards, steam factory yards, or any gun wharf, arsenal, barrack, or hospital belonging to his Majesty, whether in or out of the United Kingdom.

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5. Any place on shore, whether in or out of the United Kingdom, for all offences under the Articles of War, *except* offences punishable by ordinary law under sec. 45.

Inland waters.

All inland navigation is included under the first head.

The wide terms of this enactment embrace the lakes and great waters of British North America, which, under the state of the law previous to 1866, required a special statute to bring them within naval jurisdiction.

Jurisdiction of the Admiralty.

Under the second head are comprised the main or high seas, and coasts of the sea, not being within any county; for these are the limits to which the jurisdiction of the Admiralty is confined. The main sea begins at low-water-mark; and below low-water-mark the Admiralty have sole and exclusive jurisdiction, but between high and low-water-mark the common law and the Admiralty have jurisdiction by turns, the former upon the land, the latter upon the water; but if the water is within a county, the common law claims jurisdiction.[1]

All ports and havens, and arms of the sea, where the land is seen on both sides, are within the bodies of the counties which they adjoin.[2]

Arms of the sea.

Thus it has been held that the Bristol Channel, between the shores of Glamorganshire and Somersetshire, where it is about ten miles across, and *where one shore is visible from the other on a clear day*, is within the bodies of the counties by which it is bounded, and that a felony committed on board ship about three-quarters of a mile from the Glamorganshire shore, was committed within the body of the county of Glamorgan.[3]

Concurrent jurisdiction of the courts of law.

The common law in England and Ireland and the municipal law in Scotland have concurrent jurisdiction

[1] 3 Finch, Discourse of Laws, 78; *Constable's Case* (1601), 5 Rep. 107, a; 1 Steph. Com., 15th ed., 70; *R.* v. 49 *Casks of Brandy* (1836), 3 Hagg. 275.

[2] 3 Coke, Inst. 113.

[3] *R.* v. *Cunningham* (1859), 28 L. J. M. C. 66, C. C. R.

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with courts-martial, where crimes are committed by any person subject to and triable under the Naval Discipline Act within the bounds of the United Kingdom, and his Majesty's justices of assize have concurrent jurisdiction for the trying of offences committed within the jurisdiction of the Admiralty of England.[1] If it be a matter of convenience and discretion to determine whether prisoners should be tried by court-martial, or the ordinary tribunals; or if in any case a conflict of jurisdiction is likely to arise; it must be remembered that no powers of the Naval Discipline Act[2] are to be deemed to supersede or affect the authority of the ordinary courts in respect of any offence punishable by the common or statute law, or to prevent any person being proceeded against and punished in respect of any such offence otherwise than under the Naval Discipline Act.

Desirability of remitting grave civil offences to civil tribunals.

Indeed it is generally agreed by both naval and civil authorities that such crimes as murder and manslaughter committed on board his Majesty's ships should be tried by the civil tribunals, and that such minor offences as larcenies, assaults, &c., should be dealt with by naval law. Murder on board his Majesty's ships is triable by court-martial, but the criminal jurisdiction of the civil authorities over murder and all other civil crimes continues, and if the offence has been committed on board one of his Majesty's ships, or by an officer or man in his Majesty's service, it rests entirely with such civil authorities whether they will demand the offender or not; if they do demand him the naval authorities cannot refuse to give him up. [A. L. *L. M. M.*, 17th Oct., 1872, to C.-in-c., Plymouth.]

In the case which was the subject of the foregoing Admiralty letter, the Admiralty law-agent at Plymouth was directed to prosecute before the civil authorities a

[1] 7 & 8 Vict. c. 2, s. 1.
[2] N. D. Act, s. 101.

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man belonging to H.M.S. "Indus," who was charged with causing the death of a stoker of that ship. The deceased, at the time, was in the execution of his duty. The Admiralty considered that, in addition to other advantages, the presence of the Admiralty law agent would ensure due consideration to the naval service.

Offences exclusively naval.

If an offence be exclusively naval, punishable only under the specific provisions of the Naval Discipline Act, jurisdiction will be confined to a naval court-martial, or to the commanding officer in cases where summary punishment may be awarded. [N. D. Act, sec. 56.]

Concurrent jurisdiction of the municipal courts in foreign countries.

When offences shall be committed by persons subject to the Naval Discipline Act on shore *out* of the United Kingdom, and shall be of such a character as to be punishable by the municipal laws of the country in which they are committed, the courts of the country will have concurrent jurisdiction over the offender if arrested on shore; and the right (if it be thought expedient by the municipal authorities) to supersede the jurisdiction of a naval court-martial. For crimes are local, and punishable where they are committed;[1] and strangers are equally bound with natives to obedience to the laws of the country during the time they sojourn in it, and they are equally amenable for infractions of the law.[2]

Penalty for offences punishable at ordinary law, when committed out of England.

But if an offence punishable by the laws of England, had it been committed in England, be committed by any person subject to the Naval Discipline Act on shore, in a country where there is no established law, or in a country where there is, but under such circumstances as to render the offender amenable to a court-martial, he may be charged with such offence before a court-martial, and, if found guilty, subjected to the same punishment as might have been awarded by any competent criminal

[1] Story's Conflict of Law, 620.
[2] Kent's Comm. i. 39.

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tribunal, had he been tried and convicted before such a tribunal in England. [N. D. Act, sec. 45.]

3. *Jurisdiction as to Time.*

Limitation of time as to trials.

The limits of jurisdiction as to *time* are fixed by the following enactment:—

> "No person, unless he be an offender who has avoided apprehension, or fled from justice, shall be tried or punished in pursuance of this Act for any offence committed by him unless such trial shall take place within three years from the commission of such offence, or within one year after the return of such offender to the United Kingdom, where he has been absent from the United Kingdom during such period of three years." [N. D. Act, sec. 54.]

It will thus be seen that three years from the commission of the offence is the ordinary time of limitation within which a trial under the Naval Discipline Act must take place; the one year after the return of the offender is a period superadded to the three years mentioned in the former part of the clause, in order to provide for cases where there shall have been no opportunity of holding a court-martial during the interval of the delinquent's absence from the United Kingdom. A criminal who has avoided apprehension, or fled from justice, may be tried whenever captured, without reference to any limitation of time.

Trial of offenders who have left the service.

It would appear that no change in the personal condition of the offender after the commission of the offence would affect his liability: he must stand or fall in reference to the position that he held when the alleged offence was committed. An officer might go on half pay or leave the service; a sailor be discharged, and enter into a merchant ship: in either case he would be amenable to a trial by court-martial, provided the offence charged was committed within the prescribed period of limitation

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and at a time when the offender belonged to the navy, or was within some one of the provisions which render a person subject to the Naval Discipline Act. That this is the evident intention of the Act is shown by sec. 73, which provides for the trial by court-martial of offenders already under sentence of penal servitude, a sentence which involves dismissal from his Majesty's service with disgrace.

Exceptional occasions.

Such are the limits of jurisdiction as to person, place and time under the Naval Discipline Act; such the boundaries of positive law, as applicable to the navy; yet there may be times in which a naval officer cannot rely on the laws for the ordinary government of the navy alone: he may be called upon to act in a crisis when they will not apply, and to enforce discipline amongst persons who are not subject to military law; he must then have recourse to martial, as distinguished from military law, and himself, of his own authority, declare the rules, regulations, and limits, of the measures that he may think necessary for the public safety. Such occasions are very rare, and the possible localities in which such powers can be exercised very circumscribed.

Applicability of martial law.

Proclamation of martial law at Balaclava.

This question was carefully considered by the law officers of the Crown in 1855, when it was judged necessary to extend martial law to the harbour and roadstead of Balaclava, then being part of an enemy's territory in the hostile occupation of her Majesty's forces. The following was their opinion:—

"It is competent to her Majesty's commanders to declare that martial law shall prevail in the territory of which they are thus in the armed occupation, and, under the sanction of military authority, to lay down rules which they deem essential to be observed for the preservation of her Majesty's forces and military stores.

"To these rules all persons resorting to this territory

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(not being in the military or naval service of an independent sovereign) would be bound to yield obedience.

"During the time that an invading army is in hostile possession of any portion of an enemy's country, all native laws and tribunals are suspended, and there can be no law, nor any executive for the administration of law, but that which is appointed and declared for the time being by the supreme military authority."

Jurisdiction of civilization in lawless places.

And here it may be proper to notice an opinion enunciated in 1878 by the Attorney-General, in the House of Commons, when questioned as to the legality of certain punitive acts done by the officer commanding H.M.S. "Beagle." He said: "When one of her Majesty's ships is at a place inhabited by savages, where no law prevails, and no redress for outrage can be obtained from any government or in any tribunal, and British subjects are attacked, and one of them is murdered by the natives, it seems to me that the captain of the vessel is placed in the same position as is occupied by the commander of her Majesty's forces in the field in time of war, and has the same duties cast upon him, and possesses the same rights and powers." These rights and powers, according to the customs of war common to all civilized states, include the summary infliction of punishment in such a manner as the commander may think expedient, and the creation of special tribunals by him. It follows that a naval commander might, in the circumstances related by the Attorney-General, punish summarily, or constitute a court for the investigation and punishment of offences against the persons or property of British subjects. The justification of his action would necessarily be of a moral rather than a legal nature; and force would be his only authority for compelling amenability as regards both the accused and the witnesses necessary to the investigation.

Martial law in insurrection.

The proclamation of martial law as applicable to an

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Governor Eyre's case in Jamaica.

insurrection was the subject of judicial inquiry in 1868, when a prosecution was instituted against Mr. Eyre for high crimes and misdemeanors alleged to have been committed by him in the declaration and enforcement of martial law under colour of the execution of his duty as governor of Jamaica. The case came before a grand jury in the Court of Queen's Bench at Westminster, on the 2nd of June in that year, and Blackburn, J., directed the jury that the principle of responsibility as affecting a governor or officer (though differing in degree) is the same whether he acts under the power given by the common law or a statute. "The officer is bound to exercise the power which the law gives him in the manner which under the circumstances would be right, and if he fails in something he ought to do, or which the circumstances render it his duty to do, and he neglects his duty to such an extent as to amount to criminal negligence, then he will be criminally responsible; on the other hand, if he has done so much more than he ought to have done, as to amount to criminal excess, he will in like manner be criminally responsible: the questions are co-relative, the officer is bound to hit the exact line between excess and failure of duty; for it seems that if an officer does some act altogether beyond his power, so that it could never under any circumstances have been his duty to do it, he would be responsible according to the quality of the act; and even if the doing of that illegal act was the salvation of the country, that, though it might be a good ground for the legislature afterwards passing an act of indemnity, would be no bar in law to a criminal prosecution; that is, if he has done something clearly beyond his power. But if the act which he has done is one which in a possible state of circumstances he might be authorized to do, and which even in an extreme case he might be punishable for not doing, then the case becomes very different. The honesty of intention in such a case is very important, for

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if it be shown that the officer under colour of exercising his office was really moved by any other motive than an honest desire to do his duty, there is no doubt at all he would be guilty of a misdemeanor; even if there was a perfectly honest intention, that would not of itself conclusively determine the question. The officer is bound under such circumstances to bring to the exercise of his duty ordinary firmness, judgment, and discretion; the question in each particular case is whether there was so much excess as to amount to criminal excess. Under the Colonial Act, Mr. Eyre had power in case of apprehended danger to proclaim martial law in the sense of suspending the common law, and enabling matters to be tried by summary procedure, such as is used in time of war. That is not an arbitrary power, but a power without technical or formal rules to do substantial justice in a summary way. Such power he might have on proper occasions and exercise it. Consequently if there was such a state of things that a firm reasonable man would have felt that he ought to have used this power, and he did not do so, he would have been punishable for it. If you believe that he had *bonâ fide* thought that there was a conspiracy through the island, and that it was likely to break out into insurrection unless suppressed, and he directed certain measures in consequence, then, although he may have been mistaken, if he honestly so thought, there is no ground for charging him criminally."

This is an epitome of the exposition of the law in *R.* v. *Eyre*, by Blackburn, J., stated to have been made with the sanction of the other judges of his court. The grand jury threw out the bill, and so ended this famous case. Some days afterwards, on June 8th, Cockburn, C.J., took the very unusual course of expressing his dissent, in the Court of Queen's Bench, from the charge, on two grounds: 1st. That the Colonial Act could have conferred no authority on Mr. Eyre; 2ndly. That the

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application of the law to the facts was erroneous. Both of these points are confined to the specific case, and are not material for the general consideration of the subject. Still on so important a question it is desirable to add the broad view of the law declared as follows, by Cockburn, C.J., though it contains no proposition of *law* at variance with the charge of Blackburn, J.:—

"There was a proposition of law forming the basis of the charge on which we were all agreed—namely, assuming that a governor of a colony had by virtue of authority delegated to him by the Crown, or conferred on him by local legislation, the power to put martial law in force, all that could be required of him, so far as affects his responsibility in a court of criminal law, was that, in judging of the necessity, which it is admitted on all hands affords the sole justification for resorting to martial law,—either for putting this exceptional law in force or prolonging its duration,—he should not only act with an honest intention to discharge a public duty, but should bring to the consideration of the course to be pursued the careful, conscientious, and considerate judgment which may reasonably be expected from one invested with authority, and which in our opinion a governor so circumstanced is bound to exercise, before he places the Queen's subjects committed to his government beyond the pale and protection of the law. Having done this, he would not be liable for error of judgment, and still less for excesses or irregularities, committed by subordinates whom he is under the necessity of employing, if committed without his sanction or knowledge. Furthermore we considered that a governor sworn to execute the laws of a colony, if advised by those competent to advise him that those laws justify him in proclaiming martial law, cannot be held criminally responsible, if the circumstances called for its exercise, even though it should afterwards turn out that the

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received opinion as to the law was erroneous. On the other hand, in the absence of such careful and conscientious exercise of judgment, mere honesty of intention would be no excuse for the reckless, precipitate, and inconsiderate exercise of so formidable a power; still less for any abuse of it in regard to the lives and persons of Her Majesty's subjects, or in the application of immoderate severity in excess of what the exigency of the occasion imperatively called for. Neither could the continuance of martial law be excused, even as regards criminal responsibility, when the necessity which could alone justify it had ceased by the entire suppression of the insurrection, either for the punishment of those who were suspected of having been concerned in it, or of striking terror into the minds of men for the time to come." [1]

[1] *R.* v. *Eyre* (1868), L. R. 3 Q. B. 487.

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CHAPTER X.

NAVAL OFFENCES AND THE ARTICLES OF WAR.

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Naval offences.

The honour of the navy, the mutual obligations of officers and seamen, the discipline necessary for the control of bodies of armed men, are binding alike on all on board a man-of-war; they comprehend duties which have no corresponding place in civil life; the breach of these duties involves offences which do not fall under the ordinary criminal law. Such offences are exclusively naval, punishable by statute, and specified under the Articles of War.

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Articles of War.

The Articles of War form Part I. of the Naval Discipline Act, and in the treatment of those sections which need explanation or illustration it will be convenient to follow the arrangement of the sections.

The first in the catalogue of naval offences is—

Misconduct of Officers in Presence of the Enemy.

Penalty for misconduct in action.

It is enacted by sec. 2, that "Every flag officer, captain, commander, or officer commanding subject to this Act, who upon signal of battle, or on sight of a ship of an enemy which it may be his duty to engage, shall not,

"(1.) Use his utmost exertion to bring his ship into action;

"(2.) Or shall not during such action, in his own person and according to his rank, encourage his inferior officers and men to fight courageously;

"(3.) Or who shall surrender his ship to the enemy when capable of making a successful defence, or who in time of action shall improperly withdraw from the fight,

shall, if he has acted traitorously, suffer death; if he has acted from cowardice shall suffer death, or such other punishment as is herein-after mentioned; and if he has acted from negligence, or through other default, he shall be dismissed from her Majesty's service, with or without disgrace, or shall suffer such other punishment as is herein-after mentioned."[1]

Penalty for not pursuing the enemy and of not assisting a friend in view.

By sec. 3, that "Every officer subject to this Act who shall forbear to pursue the chase of any enemy, pirate, or rebel, beaten or flying, or shall not relieve and assist a known friend in view to the utmost of his power, or who shall improperly forsake his station, shall, if he has therein acted traitorously, suffer death; if he has acted from cowardice, suffer death or such other punishment as is herein-after mentioned;[1] if he has acted from negligence, or through other default, shall be dismissed from her Majesty's service, with disgrace, or shall suffer such other punishment as is herein-after mentioned."

The corresponding Article (12) in the Articles of War of 1749 prescribed death, and left no alternative to the

[1] Any punishment inferior in degree to dismissal without disgrace, under sec. 55.

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discretion of the court; under it Admiral Byng was executed in 1757, for not doing his utmost to destroy the ships of the French, which it was his duty to have engaged; though the members of the court-martial unanimously acquitted him of any imputation of cowardice or disaffection. The extreme severity of this article was mitigated by 19 Geo. III., c. 17, s. 3, which enabled a court-martial to inflict a discretionary punishment.

The motive of the officer charged is now carefully distinguished under the above sections, and the punishment of death limited to traitorous or cowardly conduct; even in the latter case a power is given to mitigate the penalty. Where there is no criminality of motive, but a want of conduct on the part of an accused officer, which may have rendered him liable to any of the above charges, every such offence, whether arising from carelessness, ignorance, unskilfulness, or any omission of duty, is included in the terms "negligence, or other default." To substantiate charges under these provisions, all the circumstances connected with the transaction must be put in evidence; but in addition to these, proof will often be required on the issue, whether it was the duty of the accused to have followed a given course in a given conjuncture: this is a matter of opinion, and to determine the point, officers of experience and judgment who were present must be called to give their opinion as skilled witnesses.[1] In all such cases the questions should be pointed with the greatest precision, and the nicest discrimination exercised in weighing the value of the testimony.

Communications with the Enemy.

Penalty for spies. Scale of punishment.

Sec. 6. All spies for the enemy shall be deemed to be persons subject to this Act, and shall suffer death or such other punishment as is herein-after mentioned.

[1] See chapter on Evidence, p. 403.

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By sec. 49 all armed rebels, armed mutineers, and pirates are included in the term "enemy."

It is to be observed, that under sec. 6, all spies for the enemy, whether civilians, British subjects, or foreigners, without any exception of person or place (provided the offence be committed within the jurisdiction pointed out in sec. 46), may be tried and punished by court-martial. [Adm. Inst. 726, *ante*, p. 112.] Great objections were made, though without success, in the debate of 1749, to the introduction of a similar Article of War, in the repealed Act of 22 Geo. II., c. 33. The liberty of the subject was declared to be in danger, and the best lord in the kingdom liable to be tried, and condemned to die by a court-martial (Parl. Hist., 1749). The true answer to objections of this character is, that no practical wrong has occurred in the working of the law, which has now subsisted in the same form for more than a century. It is obvious that the capture of a spy would be nugatory, unless he could be tried at once; and the provisions of sec. 53 (sub-ss. 1, 2, 3) afford ample safeguards against the precipitate infliction of capital punishment.

Improper communication with the enemy.

Sec. 8. Every person subject to this Act who shall, without any treacherous intention, hold any improper communication with the enemy, shall be dismissed with disgrace from her Majesty's service, or shall suffer such other punishment as is herein-after mentioned.

This is an enactment to prevent any improper communication with the enemy, such as might be subversive of good discipline, or in any respect detrimental to the public service, though the intention of the offender be not treacherous, and his fidelity unimpeached.

Mutiny.

Mutiny with violence.

Sec. 10. Where mutiny is accompanied by violence, every person subject to this Act who shall join therein shall suffer

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death, or such other punishment as is herein-after mentioned; and every person subject to this Act who shall not use his utmost exertions to suppress such mutiny shall, if he has acted traitorously, suffer death, or such other punishment as is herein-after mentioned; if he has acted from cowardice, shall suffer penal servitude or such other punishment as is herein-after mentioned; if he has acted from negligence, he shall be dismissed from her Majesty's service, with disgrace, or suffer such other punishment as is herein-after mentioned.

Mutiny without violence.

Sec. 11. Where a mutiny is not accompanied by violence, the ringleader or ringleaders of such mutiny shall suffer death, or such other punishment as is herein-after mentioned; and all other persons who shall join in such mutiny, or shall not use their utmost exertions to suppress the same, shall suffer imprisonment or such other punishment as is herein-after mentioned.

Definition of mutiny.

The offence of "mutiny"[1] is not defined in any statute, but it implies collective insubordination, or combination on the part of two or more persons, subject to military or naval law, to resist the lawful authority of superior military or naval officers, whether by violence or passive resistance; or to induce others to resist such lawful authority. It is thus either (1) the overt act of insubordination, or (2) the combination which may or may not have resulted in such overt act, or (3) a combination to induce others to insubordination. It may be a matter for discretion whether a charge shall be made of insubordination or mutiny according to the strength of the evidence as to the combined design to resist authority. The crime of mutiny is so grave that a charge for it should only be brought on very clear evidence. Cases of insubordination, even on the part of two or more, should, unless there appears to be a combined design on their part to resist authority, be charged as insubordination. The resemblance which the offence of

[1] "To mutiny: to rise against authority, to make insurrection."—Johns. Dict. The "Lima" (1837), 3 Hagg. Adm. 346—360-2.

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mutiny bears to the crime of conspiracy is apparent, and the evidence necessary to prove it is of the same character.

It may be considered clear that a single person would not fall under the provisions of this section; for the words "every person who shall *join* therein" in the 10th, and "all other persons who shall *join* in such mutiny" in the 11th sections, necessarily imply that *there must be more than one person engaged to constitute a state of mutiny.* By comparing the 17th with the 10th and 11th sections, a reasonable inference may be drawn of the meaning of the term "mutiny."

Concerted refusal on the part of several seamen to obey the command of their superior officer (but without violence shown or threatened) may be considered mutiny.

Mutiny must be something greater than insubordination, which is declared to exist (sec. 17) "when any person shall wilfully disobey any lawful command of his superior officer, or shall use threatening or insulting language, or behave with contempt to his superior officer." Mutiny may either be "accompanied by violence" or "not accompanied by violence" (secs. 10 and 11).

Though a single person unaided by any accessory, cannot be guilty of mutiny under the requirements of secs. 10 and 11, still the mutinous behaviour of a single individual is punishable under such of the other sections of the same heading as the nature of his conduct may determine.

Mutiny is necessarily aggravated in proportion to the violence of the mutineers; consequently there is a very proper modification of punishment to be awarded to the general body of offenders when the mutiny is unaccompanied with violence; but the ringleaders are excepted, for a deeper guilt always attaches to those who instigate and head a mutiny.

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Any mutiny, or attempt to mutiny, is subversive of all discipline, and, if not immediately repressed, destructive of the interests of the service; hence criminality, and corresponding penalties, are attached not only to the actual mutineers, but to every person subject to naval authority who does not use his utmost exertions in the suppression of mutiny; but the motives of inactive bystanders are to be discriminated accurately, and punishment awarded in proportion to the guiltiness of intention which shall have governed their conduct (secs. 10, 11, 12, 14, 15).

The first fact to be proved is the mutiny; secondly, evidence must be given to connect the accused with it; and lastly, if it be intended to give in evidence against him the acts of any other person, it must be shown that such person was also engaged in the same mutiny, and that the act was done in furtherance of the common design.

Summary punishment of mutiny.

"Mutiny with violence" (sec. 10), and on the part of the ringleaders "mutiny without violence" (sec. 11), are capital offences. These offences, being "capital," cannot be dealt with summarily by the commanding officer; they must be reserved for trial by court-martial.

Seducing from Allegiance.

Penalty for civilians endeavouring to seduce from allegiance.

Sec. 13. Every person, not otherwise subject to this Act, who, being on board any ship of her Majesty, shall endeavour to seduce from his duty or allegiance to her Majesty any person subject to this Act, shall so far as respects such offence be deemed to be a person subject to this Act, and shall suffer death or such other punishment as is herein-after mentioned.

Passengers who shall be guilty of the offences specified in this section shall be tried by naval court-martial, and punished according to the provisions of the Naval Discipline Act. [Adm. Inst. Art. 726, *vide* p. 120.]

It is to be observed that the jurisdiction of courts-martial is limited by this section to such civilians as shall be actually on board some one of his Majesty's ships at

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the time of the commission of the offence. If civilians are found on shore or elsewhere "endeavouring to seduce persons serving in his Majesty's forces by sea and land from their duty and allegiance to his Majesty, and to incite them to mutiny and disobedience," they may, if the offence be committed in any part of England, be indicted in the ordinary criminal courts of assize for any county, and punished under the provisions of 37 Geo. III., c. 70, revived by 57 Geo. III., c. 7, and 7 Will. IV. & 1 Vict. c. 91. By the Act of Geo. III., c. 70, everyone commits felony, and is liable, upon conviction, to penal servitude for life, who maliciously and advisedly endeavours to seduce any person serving in his Majesty's forces by sea or land from his duty or allegiance; or to incite or stir up any such person to commit any act of mutiny; or to make or endeavour to make any mutinous assembly, or to commit any traitorous or mutinous practice whatever.

Making mutinous assembly, &c.

A person charged with any of the offences triable under sec. 14 might be found guilty of a lesser crime and punished under sec. 43. ["Acts to the prejudice of good order and naval discipline."]

Striking, &c., Superior Officer, &c.

Punishment for striking or attempting to strike, &c., superior officer.

Sec. 16. Every person subject to this Act who shall strike, or with any weapon attempt to strike, or draw or lift up any weapon against his superior officer being in the execution of his office, shall be punished with death or such other punishment as is herein-after mentioned; and every person subject to this Act who shall, otherwise than with a weapon, attempt to strike or use or attempt to use any violence against his superior officer being in the execution of his office, shall be punished with penal servitude or such other punishment as is herein-after mentioned; and every person subject to this Act who shall strike or attempt to strike, or draw or lift up any weapon against, or use or attempt to use any violence against his superior officer not being in the execution of his office, shall be punished with penal servitude or such other punishment as is herein-after mentioned.

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In 1866 an important modification was introduced into this section by limiting the extreme sentence of death to cases of actually striking, or attempting to strike *with a weapon*, a superior officer in the execution of his office. In the Act of 1861, all offers to use violence to a superior officer in the execution of his office were punishable with death.

It will be observed that striking, or attempting to strike with a weapon, a superior officer in the execution of his office is a capital offence, and is therefore triable and punishable by court-martial only (sec. 56).

Definition of "superior officer."

The words "superior officer" include all officers, petty and non-commissioned officers, acting petty and acting non-commissioned officers, lance-sergeants, and lance-corporals, borne on the books of one of his Majesty's ships. (*Vide* N. D. Act, s. 86; Adm. Inst. 1138, cl. 2.)

Persons in temporary authority.

No person subordinate to a petty officer, but temporarily acting in the room of a petty officer, nor any such person in temporary charge of a working party, boat's crew, or other body of men, can be considered the superior officer of the men temporarily in his charge, within the meaning of the Act, although for the purposes of discipline he has authority over them for the time being. The offence, therefore, of striking, &c., any such person should, when dealt with by court-martial, be made a charge under s. 43. This does not refer to *bonâ fide* acting petty and non-commissioned officers, nor to lance-sergeants and lance-corporals [C. M. Memo. p. 49].

In 1885 an A.B. was tried for striking a sergeant of the Oxford Light Infantry, who was described in the charge as the superior officer of the accused. The Admiralty cancelled the sentence on the ground that the sergeant was not the prisoner's superior officer within the meaning of the N. D. Act. This case furnishes a ruling that the superior officer, as well as the accused, must belong to the navy and be subject to that Act.

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Definition of "execution of office."

A superior officer is always to be considered as in the execution of his office when afloat in his Majesty's ships and vessels, and when on duty on shore at naval barracks or elsewhere, and also in any other circumstances in which he may be called upon to exercise his office. In all other circumstances resulting in the trial of an offender for striking, &c., his superior officer the latter should be described as not being in the execution of his office. [C. M. Memo., p. 49.]

Insubordination.

Penalty for disobedience or using threatening language to a superior officer.

Sec. 17. Every person subject to this Act who shall wilfully disobey any lawful command of his superior officer or shall use threatening or insulting language, or behave with contempt to his superior officer, shall be punished with dismissal with disgrace from her Majesty's service, or suffer such other punishment as is herein-after mentioned.

Lawful command.

The definition of "superior officer" already given under preceding sections applies equally to this section; but to render the disobedience a punishable offence, the command of the superior officer must be lawful—*i.e.*, in consonance with the laws of the land and of the navy. [See Chap. XIV.] It would be highly inexpedient to subject a person to the severe punishment authorized by this section for disobedience of the obviously unreasonable or unjustifiable commands of a superior officer, unless attendant circumstances rendered such a course absolutely necessary for the maintenance of proper discipline.

The Admiralty Instructions, Art. 7 and 8, provide that:—

Unlawful commands.

If an officer should receive from his superior an order which he deems at variance with his obedience to any article in these Regulations and Instructions, or with any particular order that may have been issued by the Admiralty, or other his superior officer, he is to represent verbally—or in writing if it does not require immediate obedience—such contrariety to the officer from whom he receives it; and if after such representation that officer shall still direct him to obey the order, he is to

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do so ; but if he thinks it necessary, he may report the circumstances, as the case may require, through his captain, to his commander-in-chief, or to the Admiralty, to which every officer has the right of ultimate appeal through the proper channel. [See also Art. 410 and 411.]

Misconduct of superiors, &c.

If an officer or other person should observe any misconduct in his superior, or should suffer any personal oppression, injustice, or other ill-treatment at his hands, he is not on that account to fail in any degree, in the respect and obedience due to such superior officer ; but he may represent such misconduct or ill-treatment in the first instance, to the captain of the ship to which he belongs, or subsequently as the case may require, in each instance sending the representation through the proper channel, to the officer commanding the squadron in which he serves or to the commander-in-chief, or finally to the Secretary of the Admiralty. [See **Art. 716.**]

Threatening language.

Where threatening or insulting language is charged, the actual words will be set out as nearly as possible in the Circumstantial Letter, in order that the prisoner may know how to prepare his defence, but the Admiralty direct that they are not to be stated in the charge.

Penalty for quarrelling, &c., or using reproachful speech or gestures.

Sec. 18. Every person subject to this Act who shall quarrel or fight with any other person, whether such other person be or be not subject to this Act, or shall use reproachful or provoking speeches or gestures tending to make any quarrel or disturbance, shall suffer imprisonment or such other punishment as is herein-after mentioned.

Duelling.

Articles 15 and 718 of the Admiralty Instructions contain the following orders and remarks on the subject of duelling :—

Every officer in his Majesty's fleet is hereby ordered neither to send nor to accept a challenge to fight a duel. [Art. 15.]

Duelling being forbidden by the regulations, every officer of the fleet who becomes aware of the intention of other officers to fight a duel, or has reason to believe that such is likely to occur from circumstances that have come within his observation or knowledge, is hereby ordered to take every measure within his power to prevent such duel, having recourse, if necessary, to his captain.

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2. Every officer of the fleet is hereby ordered, in no manner or degree, to evince dissatisfaction with, or to upbraid another officer for refusing, or not sending, a challenge ; and all officers are enjoined neither to reject, nor advise the rejection of, a reasonable proposition for the honourable adjustment of differences that may have occurred.

3. Any officer of the fleet who may be called on to act as second or friend to an officer intending to fight a duel, is to consider it to be his imperative duty, and he is hereby ordered, strenuously to exert himself to effect an adjustment between the adverse parties on terms consistent with the honour of each, and should he fail, owing to the determination of the offended parties not to accept honourable terms of accommodation, he must be guided by the second clause of this article.

4. As obedience to orders is the essential and governing principle of the naval service, those officers may rest assured of the support and approbation of the Admiralty, who, having had the misfortune of giving offence to, or having injured or insulted others, shall frankly explain, apologise, or offer redress for the same ; or who, having received offence, injury, or insult from another, shall cordially accept frank explanation, apology, or redress for the same ; or who, if such explanation, apology, or redress is refused to be made or accepted, shall submit the matter to be dealt with by the captain or senior officer present; and every officer who shall act as herein directed, and consequently refuse to accept a challenge, will be deemed to have acted honourably, and to have evinced a requisite obedience, not only to this order, but also to the pleasure of the King. [Art. 718.]

Desertion and Absence without Leave.

Penalty for desertion.

Sec. 19. Every person subject to this Act who shall absent himself from his ship, or from the place where his duty requires him to be, with an intention of not returning to such ship or place, or who shall at any time and under any circumstances when absent from his ship or place of duty, do any act which shows that he has an intention of not returning to such ship or place, shall be deemed to have deserted, and shall be punished accordingly ; that is to say,

(1) If he has deserted to the enemy he shall be punished with death or such other punishment as is herein-after mentioned ;

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(2) If he has deserted under any other circumstances, he shall be punished with penal servitude or such other punishment as is herein-after mentioned ;

and in every such case he shall forfeit all pay, head money, bounty, salvage, prize money, and allowances that have been earned by him, and all annuities, pensions, gratuities, medals, and decorations that may have been granted to him, and also all clothes and effects which he may have left on board the ship or at the place from which he has deserted, unless the tribunal by which he is tried, or the Admiralty, shall otherwise direct.

Desertion to the enemy has always been deemed a most grave crime among military nations, both in ancient and modern times; desertion is the betrayal of the State. By the Athenians and Romans it was punished with death.[1] It is a capital crime under the French "Code de Justice Maritime."

Desertion was made a capital felony by many old Acts in the English statute book (viz., 18 Hen. VI., c. 19, 2 & 3 Edw. VI., c. 2, 5 Eliz. c. 5); they have all now fallen into disuse, both because the manner of retaining soldiers and seamen therein referred to is no longer adopted, and because, since the specific enactment of military law, a more compendious and convenient system of coercion has been in force.

Intention is the test of desertion.

A simple test is provided by sec. 19 of the Naval Discipline Act in proof of desertion; for in order to complete the offence, there must be absence on the part of the offender, from his ship, or place of duty, *with an intention of not returning.* Intention is therefore an essential ingredient in the offence of desertion, and in estimating the real intention of the prisoner, the conclusion must be founded on a careful consideration of his conduct and declarations, according to the plain fundamental rule that a man's motives and intentions are to be inferred from the means which he uses, and the acts that he does.

[1] 1 McArthur, 63 ; 1 Bl. Com. 415.

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"Attempt to desert."

As a consequence of this rule it is not necessary that a deserter shall have succeeded in fully effecting an escape, and therefore a charge of "attempting to desert" must not be drawn. The following instances will serve to illustrate this matter.

Proof of desertion

Where upon a charge of desertion under 22 Geo. II., c. 33, s. 16, it appeared that two seamen of H.M.S. "Duke of Wellington" had leave of absence, and *during* their leave signed articles in London to join a merchant vessel to go a distant voyage, and obtained advance notes for wages from this merchant ship, and got the notes cashed: proof of these facts was considered good evidence of intention to desert.

So, where persons who are improperly absent are found to have disposed of their clothes, effects, &c., the natural inference is that they have no intention of returning. In such cases a charge of desertion should be preferred even though the offenders may not have succeeded in escaping to any considerable distance from their ship.

Lesser offence.

Should the intention to desert not be proved, the offenders may (secs. 47 and 48) be found guilty of improperly leaving their ship (sec. 22), or of absence without leave (sec. 23), and punished accordingly.

Forfeiture of pay, effects, &c.

Section 19 provides for the forfeiture of the pay, effects, &c., of persons found guilty of desertion. Therefore, unless the tribunal by which they are tried direct that such forfeitures are *not* to take place, it is unnecessary to refer to them in the sentence. Under Article 1356 of the Admiralty Instructions, deserters are not entitled to count for pension any time served by them prior to their desertion unless the letter "R" or "R Q" shall have been removed from their names under clause 2 or 3 of Article 794.

Apprehension of deserters.

Great facilities are given for obtaining the aid of the civil power in the apprehension of naval deserters under secs. 9 and 10 of 10 & 11 Vict. c. 62, which are epitomised in Article 795 of the Admiralty Instructions; but it is

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important to notice that the formality of taking the deserter before a magistrate has been duly observed before receiving him from the civil police into naval custody.

Sec. 9. Be it enacted that it shall be lawful for the constable of any place where any person reasonably suspected to belong to her Majesty's navy, and to be a deserter, or improperly absent from his duty, shall be found, or of any adjoining place, and if no such constable can be immediately met with to secure him, then for any person in her Majesty's service, to apprehend, or cause such suspected person to be apprehended, and cause him to be brought before any justice in the United Kingdom, or in any of her Majesty's dominions or territories, or in the territories under the government of the East India Company in or near such place, who shall examine such suspected person, and if by his confession, or the testimony of one or more witness or witnesses, upon oath, or by the knowledge of such justice, it shall appear that any person brought before him is a person belonging to her Majesty's navy, improperly absent from his duty, such justice shall forthwith cause him to be conveyed to the nearest or most convenient public prison, and shall transmit an account thereof to the Secretary of the Admiralty, or to any commander-in-chief, or officer commanding any one of her Majesty's ships or vessels, with a description of such person, and the name of the ship or vessel to which he shall or may be suspected to belong; or if any such offender shall be apprehended by any person in her Majesty's service, or shall be apprehended in the vicinity of any one of her Majesty's ships or vessels in commission, then such justice shall order him to be taken on board any such ship or vessel, instead of committing him to prison; and in all cases the justice shall certify the name of the person, by whom the offender was apprehended, and such last mentioned person shall be entitled to a reward for such apprehension,[1] according to the amount which is or may be established by the naval regulations or instructions for the time being in that behalf, or in case the apprehension shall be under circumstances for which no reward is or may be established, the amount of such reward shall be any sum in the discretion of the Lord High Admiral, or the said

[1] See Adm. Inst. Arts. 795 to 797.

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commissioners, or of the officer commanding the vessel to which the deserter, or person who shall have been improperly absent shall belong, not exceeding three pounds, and the reward shall in every case be paid and charged against the wages or pay of any such offender, and stopped out of the same; and for every such information, commitment, or order and account as aforesaid, the clerk of the said justice may be entitled to a fee of two shillings and no more, and every gaoler, and other person into whose custody any such offender is committed, shall immediately, upon the receipt of him, pay such fee of two shillings, and also, upon the production of a receipt from the medical practitioner who may have been required to examine such suspected person, a fee of two shillings and sixpence, and such sums shall be repaid to such gaoler or other person, and the same, together with sixpence for every day the offender shall be in his custody, which shall be paid to such gaoler or other person, shall be charged against the pay or wages of the offender, and every gaoler or other person having the custody of any such offender shall deliver him up to any person authorized to take charge of him by the Lord High Admiral, or the commissioners for executing the office of Lord High Admiral, or by any naval commander-in-chief, or the officer commanding any one of her Majesty's ships or vessels, and any person so authorized shall convey him in safe custody on board any one of her Majesty's ships or vessels in commission.

Fraudulent confession of desertion.

Sec. 10. And be it enacted, that any person who shall voluntarily deliver himself up as, and confess himself to be, a deserter from any one of her Majesty's ships or vessels, or improperly absent from such ship or vessel, or who, while serving in any of her Majesty's forces, or the embodied militia, or the forces of the East India Company, shall to any officer or non-commissioned officer thereof confess himself to be a deserter, as aforesaid, or improperly absent as aforesaid, or who, upon being apprehended for any offence, shall in the presence of the justice confess himself to be a deserter, or improperly absent from his ship or vessel as aforesaid, and his statement shall not be true, he shall, if received into her Majesty's naval service, be deemed in her Majesty's navy, and be liable to serve and be detained therein as if he had voluntarily entered, or in case such person shall not be received into her Majesty's navy, he shall, on conviction thereof before two justices of the peace, at, or near the place where he shall deliver himself up, or confess, or where he may at any time happen to be, be adjudged to be punished,

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if in England, as a rogue and a vagabond, and if in Scotland or Ireland, by commitment to some prison or house of correction, there to be kept to hard labour for any time not exceeding three months.

Warrant for arrest.

The Naval Discipline Act (sec. 50) provides for the apprehension of offenders under a warrant issued by the naval authorities. It enables officers in command to authorize the police or other persons to arrest offenders and convey them direct on board their ships instead of taking them before a magistrate. [Form S. 244. Adm. Inst. 602 and 793, cl. 4.] Persons subject to the Act are (sec. 51) liable to punishment for not using their utmost endeavours to apprehend all offenders against the Act; no warrant is required by them.

Penalty for absence without leave.

Sec. 23. Every person subject to this Act who (without being guilty of desertion or of improperly leaving his ship or place of duty) shall be absent without leave shall be liable to imprisonment for any period not exceeding ten weeks, with or without hard labour, or such other punishment as the circumstances of the case may require, and to such other punishment by forfeiture of wages or of other benefits as the Admiralty from time to time by regulations prescribe.

Under this section, the mere fact of *absence without leave* is made criminal, and the offence is complete on proof being given of that fact. No excuse can be derived from the intentions of the offender, although many circumstances of alleviation may appear in evidence, which ought to have weight in mitigation of the punishment to be awarded.

Miscellaneous Offences.

Penalty for profane swearing and other immoralities

Sec. 27. Every person subject to this Act who shall be guilty of any profane oath, cursing, execration, drunkenness, uncleanness, or other scandalous action in derogation of God's honour and corruption of good manners, shall be dismissed from her Majesty's service with disgrace, or suffer such other punishment as is herein-after mentioned.

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Drunkenness.

Charges of drinking intoxicating liquors to such excess as to produce illness incapacitating from duty are not to be tried under this section, but under sec. 43.

Other charges of drunkenness should be drawn under sec. 27, and the charge should allege that on the occasion in question the accused was "drunk."

Definition of "drunk."

In cases of trial on a charge of drunkenness where conflicting or indecisive evidence is given, it may sometimes be very difficult to arrive at a satisfactory conclusion. The proper meaning to be attributed to the word "drunk" in such a charge is this, that through the intoxicating effect of liquor the prisoner was unfit to be intrusted with his duty. On the one hand it is not necessary for the prosecution to prove that the accused was through liquor in any extreme condition; nor is the accused necessarily entitled to an acquittal by showing that on the occasion in question he could, or actually did, do some particular duty without manifest failure. If, upon consideration of all the evidence, the court comes to the conclusion that he was, through the intoxicating effect of liquor, unfit to be intrusted with his duty, they should find him guilty of the charge. If, on the other hand, in the opinion of the court it is not satisfactorily proved that accused was, through the intoxicating effect of liquor, unfit to be intrusted with his duty, then, notwithstanding they may infer from the evidence that he had drunk more than usual, they ought to acquit. It is not considered there is any offence of the same class as drunkenness involving a less degree of punishment so as to admit of a modified finding by the court under the general power given by sec. 48 of the Naval Discipline Act.

The responsibility for deciding in the first instance in cases of alleged drunkenness whether an officer or man is in a fit state to perform his duties rests with the commanding officer; but in a case of this nature, should there be any doubt as to the reason of the accused's condition, it is desirable that the opinion of the medical officer should be obtained at once. Otherwise a plea of sickness may be brought forward at the court-martial or other later investigation, and the omission of this precaution may be taken advantage of by the accused, with the result that a guilty person may escape the punishment due to his offence. [Adm. Inst. 687a; C. M. Memo., p. 39.]

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Sec. 28. Every officer subject to this Act who shall be guilty of cruelty, or of any scandalous or fraudulent conduct, shall be dismissed with disgrace from her Majesty's service; and every officer subject to this Act who shall be guilty of any other conduct unbecoming the character of an officer shall be dismissed, with or without disgrace, from her Majesty's service.

Penalty on officer for cruelty or oppression.

This section is confined to such cruel, scandalous, or fraudulent conduct in an officer, as would not amount to *a crime* punishable under any specific clause of the Naval Discipline Act or at ordinary law. Such a construction was given to the corresponding[1] article of 22 Geo. II., c. 33, in *Mann* v. *Owen*,[2] where Parke, J., observed, "The 33rd article applies to offences not of a criminal character which would render a man liable to an indictment, but to conduct unbecoming the character of an officer." And Littledale, J., "A man may behave in a scandalous, oppressive, cruel, or fraudulent manner, and yet may not be punishable by the common law:" for the 33rd Article "was intended to apply to conduct unbecoming the character of an officer, and not to *crimes*."

A pertinent example of this distinction, and of a case where the cruelty of a superior officer under colour of the enforcement of discipline, may amount to a crime, is given by Eyre, B., in *Sutton* v. *Johnstone*,[3] "It may not be fit in point of discipline that a subordinate officer should dispute the command of his superior, if he were ordered to go to the mast-head: but if the superior were to order him thither, knowing, that from some bodily infirmity it was impossible that he should execute the order, and that he must infallibly break his neck in the

[1] Art. 33. "If any flag-officer, captain, or commander or lieutenant belonging to the fleet, shall be convicted before a court-martial of behaving in a scandalous, infamous, cruel, oppressive or fraudulent manner, unbecoming the character of an officer, he shall be dismissed from his Majesty's service."

[2] (1829), 9 B. & C. 602.

[3] (1786), 1 T. R. 503.

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attempt, and it were so to happen, the discipline of the navy would not protect that superior from being guilty of the crime of murder. And one may observe in general in respect of what is done under powers incident to situations, that there is a wide difference between indulging to situation a latitude touching the *extent of power* and touching the *abuse* of it."

The following is an extract from an Admiralty letter respecting the punishment of officers under this section:—

3. The provisions in this section with respect to the sentence to be awarded are peremptory. If, therefore, a court-martial find an officer guilty of a charge framed under it, they have no choice but to award the punishment prescribed; any other sentence is illegal, and cannot be enforced.

4. The court may, however, if they think fit, acquit the prisoner of so much of the charge as alleges cruelty, or scandalous, or fraudulent conduct, or conduct unbecoming the character of an officer, as the case may be, and may then pass a sentence inferior to that of dismissal.

5. Every officer authorized to order trials by court-martial should weigh the circumstances of the complaint in each case, so as not to permit any charge to be framed against an officer under this 28th section, unless in his opinion the offence is one which should be met by dismissal from her Majesty's service. [A. L., 12th Nov., 1869.]

If the court adopt the course authorized in paragragh 4, punishment should be awarded under sec. 43.

Where there is a doubt whether a more serious charge will be completely established, it is sometimes desirable to include a further charge of another and less serious class upon which, if the facts warrant it, the prisoner may be convicted, as sec. 48 of the Naval Discipline Act only authorizes the court to find a prisoner guilty of another less serious offence *of the same class* as that charged.

Drunkenness is triable under sec. 27, but the drinking

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of intoxicating liquors to such excess as to produce illness incapacitating an officer from the performance of duty is ordered to be tried under sec. 43; not under sec. 28.

Penalty for suffering ships to be improperly lost.

Sec. 29. Every person subject to this Act who shall either designedly or negligently or by any default lose, strand, or hazard, or suffer to be lost, stranded, or hazarded, any ship of her Majesty or in her Majesty's service, shall be dismissed from her Majesty's service, with disgrace, or suffer such other punishment as is herein-after mentioned.

The word "designedly" implies guilty knowledge or intention in the accused, and a just conclusion on that matter must necessarily depend altogether on presumptive evidence and the inferences to be derived from a careful examination of collateral facts.[1] The word "negligently" is applicable when a ship has been lost, stranded, or hazarded, in consequence of any omission of duty.

An error of judgment is not an offence punishable under the Naval Discipline Act; a finding of error in judgment therefore involves acquittal of any offence. When persons are tried for having, by negligence or default, lost, stranded, or hazarded one of His Majesty's ships, it is incorrect to find them guilty of an error of judgment and to punish them therefor. The only offences created by sec. 29 of the Act are (1) designedly, (2) negligently, and (3) by any default, losing, stranding, or hazarding, or suffering to be lost, stranded, or hazarded, any ship of his Majesty, or in his Majesty's service. It is a question in each case for the consideration of the court whether the facts proved are such as to justify a finding, either of design, negligence, or default. If the court is satisfied that the facts proved justify the finding of design, negligence, or default, it must find the accused guilty, but the finding must, in the case of an officer,

[1] 1 Phill. Ev. 472.

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tried under sec. 29 of the Act, be that the charge is proved. If, however, the court is not satisfied that there has been design, negligence, or default on the part of the accused, amounting to an offence under the Naval Discipline Act, he must be acquitted. [C. M. Memo., p. 41, The Finding, note 2.]

Many instances have occurred in which the sentences upon officers for losing or hazarding ships-of-war have been cancelled as illegal, owing to a misconception of the nature of the proceedings to be followed at trials under secs. 29 and 92 respectively.

The following Admiralty Minutes point out clearly the course to be pursued in these cases.

In 1866, the commander, officer of the watch, and master of H.M.S. "Eclipse" were tried for "allowing jointly and severally H.M.S. 'Eclipse' to be run on a sunken rock whereby she sustained considerable damage."

This was a case in which a specific charge was brought against the three officers. The charges were partly proved, and these officers were punished. On a review of the minutes at the Admiralty, it appeared that,

> Whilst these officers were charged with running one of her Majesty's ships on a sunken rock, they were subjected to a rigid examination on oath, notwithstanding their objection to the course pursued, and the sentence was chiefly supported by the evidence thus extracted from the prisoners; the Admiralty directed the sentence to be cancelled. [C. M., No. 621.]

In 1866, the commander, officers, and ship's company of H.M.S. "Griffon" were tried on a charge of "through negligence or other default suffering H.M.S. 'Griffon' to be lost, by being run on shore."

This charge was framed under sec. 29. The court found the charge proved against the commander, lieutenant, and navigating officer; awarded punishment to these officers, and acquitted the remainder of the officers and ship's company of all blame.

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On a review of the proceedings it appeared that the commander, lieutenant, and navigating officer were sworn and examined on oath, although on their trial, and convicted mainly on their own evidence so given. The Admiralty took the opinion of the judge-advocate of the fleet on the point, and he reported that,

The proceedings were in consequence irregular. The grounds of this opinion were, that these officers were tried under the 29th section with having, through negligence or other default, suffered the ship to be lost; that this constituted a specific charge, and removed the case from the 92nd section under which, *when no specific charge is made,* officers and others on their trial for the loss of one of her Majesty's ships may be called upon to give evidence on oath. If there had been no intention to make a specific charge, the proper course would have been to have ordered the court-martial to inquire into the causes which led to the loss of the ship, and to try the commander, officers, and ship's company for their conduct on the occasion. If, on the other hand, it had been intended to charge them with negligence as to the cause of the loss of the ship, then these officers should have been charged together or separately, according to the supposed case, and the charges proved by other evidence than their own, under the 93rd section of the Act. The sentences were therefore cancelled. [C. M., No. 700.]

Crews of ships lost or destroyed.

Sec. 91. When any of her Majesty's ships shall be wrecked or lost or destroyed, or taken by the enemy, such ship shall for the purposes of this Act, be deemed to remain in commission until her crew shall be regularly removed into some other of her Majesty's ships of war, or until a court-martial shall have been held, pursuant to the custom of the navy in such cases, to inquire into the causes of the wreck, loss, destruction, or capture of the said ship.

All the officers and crew of lost ship may be tried by one court:

Sec. 92. When no specific charge shall be made against any officer or seaman or other person in the fleet for or in respect or in consequence of such wreck, loss, destruction, or capture (*i.e.* of any one of her Majesty's ships, as in sec. 91), it shall be lawful to try all the officers and crew, or all the surviving officers and crew, of any such ship, together, before one and the same court, and to call upon all or any of them when upon their trial, to give evidence on oath or affirmation before the court touching any of the matters then under inquiry, but no officer or

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seaman or other person shall be obliged to give any evidence which may tend to criminate himself.

or by separate courts.

Sec. 93. When deemed necessary by the Admiralty, or any officer authorized to order courts-martial, separate courts-martial shall be held for the trial of some one or more of such officers and crew for or in respect or in consequence of the wreck, loss, destruction, or capture of any such ship.

No specific charge.

In cases where no specific charge is made against any person, *all* the officers and crew may be tried under sec. 92, and all or any of them may be called upon to give evidence on oath respecting the loss of the ship, but the section provides that no witness is obliged to give any evidence which may tend to criminate himself. But where a specific charge is made against any of the officers or crew, they should be tried by a separate court-martial, the charge being framed under sec. 29; and in this case, if the persons tried do not elect to be examined on oath, the charge must be proved by evidence other than their own. Should it be considered necessary, separate courts-martial may be held under sec. 93 for the trial of one or more officers.

As far back as the navy has existed it has been the custom in every case to hold a court-martial when a vessel was lost or captured. In the seventeenth and first half of the eighteenth century the Articles of War no longer applied, and the pay of the officers and men ceased directly the ship was lost, with serious results both with regard to discipline and salvage of the ships. Accordingly in 1745 an Act (18 Geo. II. c. 35) was passed which enacted that when a ship was lost, not when it was captured, the Articles of War should remain in force until either (1) the crew were regularly discharged, (2) were transferred to another ship, or (3) a court-martial should be held pursuant to the custom of the navy in such cases to inquire into the causes of the loss of such ship. And it was further enacted that if the officers and men

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did their best and behaved themselves properly after the wreck their pay should continue till their discharge or death. These provisions were extended in 1748 by 21 Geo. II., c. 11, to cases of capture, and continued in force till both Acts and the general Act (13 Car. II., stat. 1, c. 9) and its amending Acts were all repealed by the general Act of 1749 (22 Geo. II., c. 33) which governed the navy till 1860. By secs. 21 & 22 of the Act of 22 Geo. II., c. 33, the sections of the Acts above referred to were re-enacted.

Sec. 21 of 22 Geo. II., c. 33 (now repealed) enacted that "all the powers given by the said articles and orders established by this Act, shall remain and be in full force with respect to the crews of such of his Majesty's ships as shall be wrecked or be otherwise lost or destroyed; and all the command, power and authority given to the officers of the said ship or ships, shall remain and be in full force as effectually as if such ship or ships to which they did belong were not so wrecked, lost or destroyed, until they shall be regularly discharged from his Majesty's further service or removed into some other of his Majesty's ships of war, or until a court-martial shall be held, pursuant to the custom of the navy in such cases, to *inquire* into the causes of the loss of the said ship or ships; and if upon such *inquiry* it shall appear by the sentence of the court-martial that all or any of the officers or seamen of the said ship or ships did their utmost to preserve, get off or recover the said ship or ships, and, since the loss thereof, have behaved themselves obediently to their superior officers, according to the discipline of the navy and the said articles and orders hereinbefore established, then all the pay and wages of the said officers and seamen, or of such of them as shall have done their duty as aforesaid, shall continue and go on, and be paid to the time of their discharge or death; or if they shall be then alive, to the time of the holding

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of such court-martial, or removal into some other of his Majesty's ships of war; and every such officer and seaman of any of his Majesty's ships of war, who *after* the wreck or loss of his ship shall act contrary to the discipline of the navy, and the several articles and orders hereinbefore established or any of them, shall be sentenced by the said court-martial, and punished as if the ship he did belong to was not so wrecked, lost or destroyed."

The concluding portion of this section established a statutory right to punish offences committed after the loss, but only in the case where the court was held to inquire into the causes of the loss.

Sec. 22 of the 22 Geo. II., c. 33, enacted that "all the pay and wages of such officers and seamen of any of his Majesty's ships as are taken by the enemy and upon inquiry at a court-martial shall appear by the sentence of the said court to have done their utmost to defend the said ship or ships, and since the taking thereof to have behaved themselves obediently to their superior officers, according to the discipline of the navy, and the said articles and orders hereinbefore established, shall continue and go on, and be paid, from the time of their being so taken, to the time of the holding of such court-martial, or until they shall be regularly discharged from his Majesty's service, or removed into some other of his Majesty's ships of war, or (if they shall die in captivity, or not live to the time of the holding of such court-martial) to the time of their death, in such manner, and not otherwise, as if the said ship or ships to which they did belong respectively was not or were not so taken."

Sec. 23 of the same Act enacted:—"Provided always, and be it further enacted, that no person or persons not flying from justice shall be tried or punished by any court-martial for any offences to be committed against this Act, unless the complaint of such offence be made in writing to the Lord High Admiral, or to the Commis-

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sioners for executing the office of Lord High Admiral for the time being, or any commander-in-chief of his Majesty's squadrons or ships empowered to hold courts-martial, or unless a court-martial to try such offender shall be ordered by the said Lord High Admiral, or the said Commissioners, or the said commander-in-chief, either within three years after such offence shall be committed, or within one year after the return of the ship or of the squadron to which such offender shall belong, into any of the ports of Great Britain or Ireland; or within one year after the return of such offender into Great Britain or Ireland."

Doubts as to legality of trying persons without specific charge.

It seems to have been the practice to summon the officers and such of the crew as was thought necessary to give evidence on these inquiries, and the officers concerned appear to have been sentenced to various punishments. Doubts as to the legality of these proceedings seem to have arisen, and in the year 1798 the opinion of the Law Officers of the Crown and Admiralty counsel was taken with regard to a sentence which had been passed on a Captain Smith.[1] That opinion, signed by Sir John Scott (afterwards Lord Eldon and Lord Chancellor of England), Sir John Mitford (afterwards Lord Redesdale and Lord Chancellor of Ireland), and Mr. S. Perceval (afterwards Prime Minister), was as follows:—

Opinion of law officers as to the practice.

"It appears from the minutes of the court-martial that the order of Admiral Rainier under which he proceeded, directed them only to inquire into the conduct of the officers and crews of the *Centurion* and *Diomede* in the action of the 22nd of October, 1794, and did not direct them to proceed to try any person for any offence. It seems to us therefore that the court though termed a court-martial was rather a court of inquiry and accordingly they

[1] 22 Nav. Chron. p. 42.

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do not appear to have had any regular charge before them against Captain Smith or any other person. The proceeding therefore to pronounce sentence upon Captain Smith as upon a regular charge appears to us not to have been warranted. We also observe that Captain Smith himself was at the outset of the business examined upon oath which we conceive to have been perfectly irregular if it were supposed to treat him as upon his trial he having a right in that case to decline being examined upon oath and to reserve what he had to say in his defence until the evidence on the part of the charges made against him had been closed. Under these circumstances we conceive the judgment is irregular and cannot be supported."

In 1851 the Admiralty again took the opinion of the Law Officers of the Crown and Admiralty counsel in relation to the loss of the "Flamer." Sir John Romilly (afterwards Master of the Rolls), Sir Alexander Cockburn (afterwards Lord Chief Justice of England) and Mr. Crowder (afterwards a Baron of the Exchequer) gave the following opinion:—

"We think the officers and crew of the 'Flamer' ought not to be tried by one court-martial upon evidence given by any of the prisoners themselves while under trial, being of opinion that in no case ought any prisoner on his trial before a court-martial to be examined upon oath as a witness. In some cases where a ship has been lost we think it may be sufficient to have a single court-martial, at which all the officers and crew may be put upon their trial together and those who are known to be free from blame may be at once acquitted and then produced as witnesses against the others. In other cases we think it may be necessary to have two separate courts-martial which may be held by the same officers. On the first court-martial that portion of the officers and crew least suspected of misconduct should be put upon their trial,

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and an acquittal taken in default of evidence, or the evidence received of such of the remainder of the officers and crew as may have any accusation to make against them; and a final sentence pronounced either of acquittal or condemnation of all or any of them. On the second court-martial the remainder of the officers and crew may be tried whether they have been witnesses on the first or not, and those already tried on the first court-martial, whether acquitted or condemned, may be admitted as witnesses for the prosecution. We think also that cases may occur in which it may be found practically more convenient to have a court of inquiry in the first instance in order to ascertain who are the probable delinquents; and afterwards a single court-martial for the acquittal at once of those to whom no blame is imputed, and the condemnation of the remainder upon the testimony of those so acquainted. Either of the three courses above suggested is legal and might be pursued in the case of the 'Flamer.' The expediency of adopting one in preference to the others must depend upon the particular circumstances of each case and would be peculiarly within the discretion of the Lords of the Admiralty."

In 1860 the statute 22 Geo. II., c. 33, was repealed by the 23 & 24 Vict. c. 123, secs. 81 and 82 of which are practically identical with secs. 92 and 93 of the present Naval Discipline Act. It would seem that secs. 92 and 93 of the present Act are the result of the opinions given by those eminent law officers of the Crown above quoted. The statute of Geo. II. continued the Articles of War to the officers and crew of a lost ship until they were regularly discharged or until a court-martial should be held to inquire into the loss of the ship, and the court was further empowered to punish the officers and crew who after the loss of the ship acted contrary to the discipline of the navy. Sec. 92 of the present Act (re-enacting sec. 81 of the Act of 1860) contains a provision which

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was not in the Act of Geo. II. Sec. 23 of the Act of Geo. II. (*supra*) enacted that no one not flying from justice was to be tried or punished by a court-martial for any offence unless the complaint of such offence was made in writing to the proper authority. The words in sec. 92 "when no specific charge shall be made . . . it shall be lawful to *try* all the officers and crew together before one and the same court" would appear to have been inserted to alter this state of the law in the one case of a ship being lost or captured. It further provides that it shall be lawful "to call upon all or any of them when upon their *trial* to give evidence on oath or affirmation . . . but no officer or seaman or other person shall be obliged to give any evidence which may tend to criminate himself." Under the Naval Discipline Act and the ordinary law a specific charge must be brought against persons on trial with the one exception specified in sec. 92, and before the Criminal Evidence Act of 1898 persons jointly charged and tried together were not competent to give evidence for or against each other. So that at the time of the passing of the Naval Discipline Act it was impossible to examine on oath any persons jointly charged and tried together. It would seem that sec. 92 was passed in order to get over both these difficulties in the sole case of loss or capture of a ship. Where persons are charged under sec. 29, however, they cannot be called upon to give evidence on oath, although they may give evidence for the defence if they choose.[1]

Present practice where no specific charge.

Wherever it is possible to do so, it would seem to be preferable to bring a specific charge, or to hold an inquiry first to ascertain who appears to blame, and this is the present practice of the Admiralty.

Before ordering a court-martial on account of the wreck, loss, destruction, or capture of one of his Majesty's

[1] Mr. J. E. R. Stephens is alone responsible for the above expression of opinion as to the meaning of ss. 91 and 92.

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ships, the officer authorized to assemble the court should ascertain, so far as may be possible, whether blame is attributable to any officer or seaman in respect of the disaster, &c. Article 662A of the Admiralty Instructions is as follows:—"A convening authority shall not issue his warrant convening a court-martial, under the provisions of sections 91 and 92 of the Naval Discipline Act, to inquire into the causes of the wreck, loss, destruction, or capture of the said ship, unless upon full consideration of all the available information, he shall be of opinion that there is no reasonable ground for thinking that any one or more of the survivors is to blame. When in any case the convening authority shall, upon full consideration of all the available information, be of opinion that it is probable that any one, or more, of the survivors is to blame for the wreck, loss, destruction, capture, hazarding, or stranding of one of his Majesty's ships, the convening authority shall direct the officer appointed by him to conduct the prosecution to prepare a circumstantial letter and charge or charges, and shall issue his warrant in the prescribed form for the trial of such one or more of the officers or crew under sections 2, 5, or 29 of the Naval Discipline Act, as the case may be. Attention is directed to the power conferred by Article 699 of the Admiralty Instructions to order a preliminary court of inquiry in all such cases as those mentioned in the above paragraphs."

Where the circumstances of the case do not necessitate a specific charge against any person, the court-martial should be ordered to inquire into the causes which led to the loss or capture of the ship, and to try the officers and crew for their conduct on the occasion, in the manner ordered by sec. 92. Should the court find any officer or seaman guilty of traitorous, cowardly, or negligent conduct with respect to such loss or capture, punishment should be awarded under secs. 2, 5, or 29, as the case

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may be. The mode of procedure when the whole of the officers and crew are tried is given in Appendix I., No. VII.

Should it be considered that blame is attributable to any of the officers and crew, separate courts-martial may (sec. 93) be ordered for their trial; and in this case the persons under trial cannot be compelled to give evidence, though they may elect to do so under the rules contained in clause 5 of Article 689 Admiralty Instructions.

Three separate courts-martial were held at Portsmouth in 1867 on account of the loss of H.M.S. "Osprey." The first for the trial of the officers and ship's company generally (with specified exceptions); the second for the trial of the commander and navigating lieutenant; the third for the trial of the officer of the watch.

Master of merchant vessel to obey orders of convoying officer.

Sec. 31. Every master or other officer in command of any merchant or other vessel under the convoy of any ship of her Majesty shall obey the commanding officer thereof in all matters relating to the navigation or security of the convoy, and shall take such precautions for avoiding the enemy as may be directed by such commanding officer; and if he shall fail to obey such directions, such commanding officer may compel obedience by force of arms, without being liable for any loss of life or of property that may result from his using such force.

Civil remedy against masters of merchant vessels.

In addition to this enactment, commanders of convoys have a civil remedy against the masters of merchant vessels who may prove unruly and disobedient: for it is enacted by 33 Geo. III, c. 66, s. 8, "that if the captain of any merchant ship under convoy shall wilfully disobey signals, or instructions, or any other lawful commands of the commander of the convoy, or shall desert the convoy without notice given and leave obtained for that purpose," he shall be liable to be articled against in the Court of Admiralty, and, on conviction, fined, at the discretion of the court, in any sum not exceeding £500, and imprisonment for any term not exceeding a year.

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Penalty for taking any goods on board other than for the use of the vessel, except gold, silver, jewels, &c.

Sec. 32. Every officer in command of any of her Majesty's ships who shall receive on board or permit to be received on board such ship any goods or merchandises whatsoever, other than for the sole use of the ship, except gold, silver, or jewels, and except goods and merchandise belonging to any merchant, or on board any ship which may be shipwrecked or in imminent danger either on the high seas or in some port, creek, or harbour, for the purpose of preserving them for their proper owners, or except such goods or merchandise as he may at any time be ordered to take or receive on board by order of the Admiralty or his superior officer, shall be dismissed from her Majesty's service, or suffer such other punishment as is herein-after mentioned.

A ship of war is not to be turned into a merchantman, and no goods or merchandise can be taken on board, other than for the public service, as specified above, except in case of salvage, or of gold, silver, or jewels.

As to the present law on the subject of the distribution of freight money, see p. 427.

Penalty for embezzling public stores.

Sec. 33. Every person subject to this Act who shall wastefully expend, embezzle, or fraudulently buy, sell, or receive any ammunition, provisions, or other public stores, and every person subject to this Act, who shall knowingly permit any such wasteful expenditure, embezzlement, sale, or receipt, shall suffer imprisonment or such other punishment as is herein-after mentioned.

Persons not subject to the Naval Discipline Act are liable to be indicted for stealing and embezzling naval stores, or for having naval stores marked with the government mark in their possession, under 32 Vict. c. 12.

Penalty for burning any magazine or vessel, &c., not belonging to an enemy.

Sec. 34. Every person subject to this Act who shall unlawfully set fire to any dockyard, victualling yard, or steam factory yard, arsenal, magazine, building, stores, or to any ship, vessel, hoy, barge, boat, or other craft, or furniture thereunto belonging, not being the property of an enemy, pirate, or rebel, shall suffer death or such other punishment as is herein-after mentioned.

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The words in this section are "set fire to," and to constitute this offence there must be an actual burning of some part of the thing (*e.g.*, building or ship) specified; a bare intent or attempt to do it is not sufficient, but a burning, however trifling, is sufficient, although the fire be afterwards extinguished.[1] Thus, where upon an indictment for setting fire to a house, it was proved that "the floor of a room was scorched, that it was charred in a trifling way; it had been at a red heat, but not in a blaze," this was held a sufficient burning.[2] But proof of a small faggot having been set on fire on the boarded floor of a room, whereby the boards were "scorched black, but not burnt," and no part of the wood consumed, was not held sufficient.[3]

The prisoner may, on failure of proof of any actual burning, be found guilty under sec. 48 of an attempt to set fire to such of the above-mentioned subjects as come under the description of "building or ship or vessel," in 24 & 25 Vict. c. 97, ss. 8, 44, by which Act he is punishable at ordinary law with penal servitude for any term not exceeding fourteen, and not less than three years, or imprisonment for any term not exceeding two years, with or without hard labour.

A charge framed on this section must allege that the offender *unlawfully* set fire to some one, or more, of the objects enumerated; for the law has here adopted the technical expression "unlawful" to indicate the intention with which the offence is committed; and the proof must correspond with the allegation, whether the offence amount to an actual burning, or only to an attempt to set on fire, as the term "unlawfully" is used in both statutes: to support this statement it must be shown that what was done, was done in such a manner as to preclude all legal cause of excuse.

[1] Hale, 568.
[2] *R.* v. *Parker* (1839), 9 C. & P. 45.
[3] *R.* v. *Russell* (1842), C. & Mar. 541.

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Penalty for making or signing false musters.

Sec. 35. Every person subject to this Act who shall knowingly make or sign a false muster or record or other official document, or who shall command, counsel, or procure the making or signing thereof, or who shall aid or abet any other person in the making or signing thereof, shall be dismissed from her Majesty's service with disgrace, or suffer such other punishment as is herein-after mentioned.

In this case it will be necessary to prove a guilty knowledge in the accused, namely, that at the time he made or signed the muster, &c., or commanded, &c., the making or signing thereof, he knew it to be false; for "actus non facit reum nisi mens sit rea." [1]

The corresponding article (31) was introduced in 1749 to check a practice which had then become very frequent, especially in the West Indies, for captains of his Majesty's ships to lend their men to masters of merchant ships, and lie in harbour till those men returned. It was remarked in the parliamentary debate of that date, that an instance had been known, "where a captain of a twenty-four-gun ship, which should have had an hundred and twenty men on board, had lent out an hundred at a time. The men found their account in it, because they had higher wages from the merchants, and, in consideration of this, they assigned their pay and provisions on board the King's ship to the captain or some trustee for him. But during the whole time of their absence, the government was cheated, and the public service neglected; nay, we have had disputes between captains about men belonging to one of his Majesty's ships, who have been pressed out of the merchant service, by the captain of another." [2]

Case of Captain Coffin.

In 1788, Captain Isaac Coffin was tried by a court-martial at Halifax, N.S., on charges exhibited against

[1] As to guilty knowledge, see *Hearne* v. *Garton and Another* (1859), 28 L. J. M. C. 216.

[2] Parl. Hist. 1749.

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him for false musters. The court found the charges partly proved, but *that no fraud was meant or did happen*, therefore the offence of false musters was mitigated, and Captain Coffin adjudged to be dismissed the ship. Soon after, the Lords of the Admiralty took into consideration the supposed lenity of the sentence, and, conceiving it to be deficient for not inflicting the punishment of cashiering the accused, and rendering him incapable of further employment in his Majesty's naval service, according to the tenor of 22 Geo. II., c. 33, s. 31, added to the punishment by striking his name off the list of captains.[1]

Captain Coffin preferred a memorial to the King in council, with a statement of the hardship of his case. This was referred to the twelve judges for their opinion: in 1793 the judges reported to the Privy Council that the sentence of the court-martial was not legal, and that the punishment directed to be inflicted under 22 Geo. II., c. 33, s. 31, could not be inflicted, or *judgment thereon be pronounced, or supplied by any other authority*, than *that of the court-martial which tried the offender*.[2]

Powers of Admiralty.

It is clear from this case, that the Lords of the Admiralty have no inherent power to *add* any incident to the sentence of a court-martial, and they have derived no such authority from the Naval Discipline Act, though they have, by sec. 53, a power, except in case of sentence of death, to *suspend, modify, or annul* any sentence on any person subject to the Act. But under an Order in Council of the 13th May, 1901, certain powers previously possessed by the Admiralty were consolidated and extended as set forth in the following schedule to the Order (K. R. Appendix XIV.):—

[1] 2 McArthur, 290.

[2] Orders in Council, 1790, Adm. Rec. vol. 41. Captain Coffin was soon afterwards reinstated in the service.

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SCHEDULE.

1. An officer who, in the opinion of the Admiralty, by reason of an act or acts of misconduct, or through intemperate or irregular habits of life has become unfit for, or, in the opinion of the Admiralty, is for any reason unworthy of, further employment, may be placed on the retired or pension list irrespective of age or service, whether he has been tried by court-martial or not.

2. An officer placed on the retired list under Clause 1, may be granted such rate of retired pay, or such gratuity, as the Admiralty may think fit, provided that the amount of retired pay shall in no case exceed the half-pay to which such officer was entitled previous to retirement, and that the amount of the gratuity awarded shall not exceed the commutation value (as assessed by the Pensions Commutation Board) of such half-pay; and shall be less than the amount of gratuity to which he would have been entitled under ordinary circumstances.

No officer may, however, be granted retired pay in excess of the amount to which he would have been entitled under ordinary circumstances.

3. An officer who has had long and good service, but who is not entitled under ordinary regulations to retired pay or gratuity, in consequence of forfeiture of service by sentence of court-martial, may be awarded such gratuity, not exceeding five hundred pounds (£500) as the Admiralty may think fit.

4. An officer dismissed the service by sentence of court-martial may be awarded a compassionate allowance not exceeding the lowest rate of half-pay of his rank; but the granting of such compassionate allowance shall be entirely at the discretion of the Admiralty.

No officer may, however, be awarded a compassionate allowance in excess of the retired pay to which he would have been entitled, under ordinary circumstances, on retirement.

5. Sub-lieutenants and assistant paymasters, whether dismissed the service by court-martial or placed on the retired list under Clause 1, may be awarded gratuities not exceeding £25 for each year's service in these ranks, nor £250 in all.

6. Commissioned warrant and warrant officers, and officers of coast guard other than commissioned officers, placed on the pension list under Clause 1, may be awarded such reduced rates of pension as the Admiralty may in each case determine.

7. Nothing in this appendix shall prejudice or affect the

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power of the Admiralty to discharge or dismiss officers or shall confer on any person who has been removed from his Majesty's service any right to half-pay, retired pay, or pension, compassionate allowance, or gratuity.

8. The expression "an officer" in this appendix shall, unless the context otherwise requires, include commissioned officers, commissioned warrant officers, warrant officers, and subordinate officers of all ranks.

Penalty for endeavouring to stir up any disturbance on account of unwholesomeness of the victuals or other just grounds.

Sec. 37. Every person subject to this Act who shall have any cause of complaint, either of the unwholesomeness of the victuals or upon any other just ground, shall quietly make the same known to his superior, or captain, or commander-in-chief, and the said superior, captain, or commander-in-chief shall, as far as he is able, cause the same to be presently remedied; and no person subject to this Act upon any pretence whatever shall attempt to stir up any disturbance, upon pain of such punishment as a court-martial may think fit to inflict, according to the degree of offence.

This is the only instance in the Naval Discipline Act in which the maximum punishment which may be awarded for the offence is not defined. Punishment in this case should be awarded under secs. 14 or 43.

Complaints, how to be preferred.

Further directions are given by the following article of the Admiralty Instructions with regard to the manner in which a complaint should be preferred:—

10. All combinations of persons belonging to the fleet, formed for the purpose of bringing about alterations in the existing regulations or customs of his Majesty's naval service, whether affecting their interests individually or collectively, are prohibited, as being contrary to the traditions and practice of the service, and injurious to its interests and discipline. Every person is fully authorized individually to make known to his superior any proper cause of complaint; but individuals are not to combine either by the appointment of committees, or in any other manner, to obtain signatures to memorials, petitions, or applications, nor are they collectively to sign any such documents.

Capture of prizes.

Sec. 38 to 42. Offences connected with the capture of prizes.

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These enactments are for the general interests of the naval service: were there no such regulations, there would be little to distinguish a capture by a man-of-war from a mere piratical venture, and all discipline would soon be lost in an indiscriminate struggle for private booty; the preservation of the evidence that determines the character of a captured ship is most material, as there can be no transfer of property in prize without a legal sentence of condemnation; the destruction of the ship's papers would subject the commander of the captor to the most serious legal liabilities.

To demonstrate the obvious necessity for these stringent rules of discipline, it may be useful to state shortly (in the language of the greatest legal authority on this subject, Lord Stowell),

1st. The nature of prize.

2ndly. What constitutes lawful prize.

3rdly. Who are entitled to the benefit of prize.

Nature of prize.

"Prize means maritime capture effected by maritime force only,"[1] and "is altogether a creature of the Crown. No man has, nor can have, any interest but what he takes as the mere gift of the Crown; beyond the extent of that gift he has nothing. This is the principle of law on the subject, and founded on the wisest reasons. The right of making war and peace is exclusively in the Crown. The acquisitions of war belong to the Crown; and the disposal of these acquisitions may be of the utmost importance for the purposes both of war and peace."[2]

2ndly. To constitute lawful prize.

Lawful prize.

"A sentence of condemnation is required in a competent court decreeing the capture to have been rightly made *jure belli;* it not being thought fit in civilized

[1] Genoa and its Dependencies (1820), 2 Dodson's Adm. Rep. 446.
[2] The "Elzebe" (1804), 5 Rob. 182.

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society that property of this sort should be converted without the sentence of a competent court pronouncing it to have been seized as the property of an enemy, and to be now become *jure belli* the property of the captor. From the moment that a sentence of condemnation becomes necessary, it imposes an additional obligation for bringing the property, on which it is to pass, into the country of the captor; for a legal sentence must be the result of legal proceedings in a legitimate court, armed with competent authority upon the subject-matter, and upon the parties concerned—a court, which has the means of pursuing the proper inquiry, and enforcing its decisions."

"These are principles of universal jurisprudence applicable to all courts, and more particularly to those which, by their constitution in all countries, must act *in rem* upon the *corpus* or substance of the thing acquired, and upon the parties, one of whom is not subject to other rights than those of war, and is amenable to no jurisdiction but such as belongs to those who possess the rights of war against him."[1]

3rdly. "It is the common practice of European states in every war to issue proclamations and edicts on the subject of prize. Under these, participation in the benefit of prizes is assigned to those who contribute to the capture."[2]

Captors entitled to prize.

"The Act of Parliament and the proclamation give the benefit of prize to the 'takers,' by which term are naturally to be understood those who actually *take possession*, or those affording an actual contribution of endeavour to that event; either of these persons are naturally included under the denomination of *takers*,

[1] The "Henrick and Maria" (1799), 4 Rob. 55–6.
[2] The "Santa Cruz" (1798), 1 Rob. 61. See Proclamation of 17th Sept., 1900, for regulating the distribution of prize; and Prize Act, 27 & 28 Vict. c. 25.

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but the courts of law have gone further, and have extended the term 'taker' to another description of persons—to those who, not having contributed actual service, are still supposed to have rendered a constructive assistance, either by conveying encouragement to the captor, or intimidation to the enemy."

"The fact of being in sight generally, with some few exceptions, has been held to be sufficient to entitle parties to be admitted joint captors."[1]

Penalty for offences against naval discipline not particularly mentioned.

Sec. 43. Every person subject to this Act who shall be guilty of any act, disorder, or neglect to the prejudice of good order and naval discipline, not herein-before specified, shall be dismissed from her Majesty's service, with disgrace, or suffer such other punishment as is herein-after mentioned.

It is to be observed that any offence or breach of discipline that does not fall specifically under any of the preceding sections of the Naval Discipline Act, and any criminal offence punishable by the laws of England (except those particularly designated in sec. 45) may be tried and punished under the provisions of this section.

Charges should be framed under this section in cases of misconduct of the following nature:

Wilful disobedience of the Admiralty Instructions.

Drinking intoxicating liquors to such an excess as to produce illness incapacitating from the performance of duty.

Irregular conduct on escort duty.

Obstructing and assaulting civil or military police.

Striking (other than superior officer).

Striking or obstructing sentry, or escort.

Writing an anonymous letter to a superior officer.

Writing an anonymous letter imputing improper conduct to a commanding officer.[2]

[1] The "Vryheid" (1799), 2 Rob. 21–23.
[2] D'Aguilar on Courts-Martial.

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An attempt by a person to obtain from the Admiralty an allowance of a certain sum per blanket, by a false representation that he had issued a certain number of blankets to the seamen, was held to be such an offence as was properly tried by a court-martial under the analogous sec. 36 of 22 Geo. II., c. 33, as being "an offence not capital, committed by a person in the fleet, not before mentioned in the Act, and for which no punishment is thereby directed to be inflicted."[1]

[1] *Mann* v. *Owen and Others* (1829), 9 B. & C. 595.

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CHAPTER XI.

OFFENCES PUNISHABLE BY ORDINARY LAW.

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General provisions.

The amplest power combined with the widest discretion is given to courts-martial by the Naval Discipline Act for the trial of offences punishable by ordinary law, and all offences not made capital by the Naval Discipline Act (when not committed by officers) may be punished summarily by the commanding officer of a King's ship. See Chap. XII.

The punishments to be awarded for the crimes of murder, manslaughter, sodomy, indecent assaults, robbery, or theft, are specifically provided for by the Act.

The punishment for any other criminal offence punishable by the laws of England may be awarded at the discretion of the court, either in pursuance of the first part of the Act (sec. 43), or according to the provisions of the ordinary criminal law of England.

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But it must always be remembered that the discretionary authority of the court can only be exercised within the precise limits pointed out by the particular statute or statutes applicable to the offence charged against the prisoner.

Penalty for offences punishable by ordinary law.

It is enacted by the Naval Discipline Act (sec. 45), that "Every person subject to this Act who shall be guilty of murder shall suffer death:

"If he shall be guilty of manslaughter he shall suffer penal servitude, or such other punishment as is herein-after mentioned:

"If he shall be guilty of sodomy with man or beast he shall suffer penal servitude:

"If he shall be guilty of an indecent assault he shall suffer penal servitude, or such other punishment as is herein-after mentioned:

"If he shall be guilty of robbery or theft he shall suffer penal servitude, or such other punishment as is herein-after mentioned:

"If he shall be guilty of any other criminal offence, which if committed in England would be punishable by the law of England, he shall, whether the offence be or be not committed in England, be punished either in pursuance of the first part of this Act, as for an act to the prejudice of good order and naval discipline not otherwise specified, or the offender shall be subject to the same punishment as might, for the time being, be awarded by any ordinary criminal tribunal competent to try the offender, if the offence had been committed in England."

Sec. 47 and 48 enable courts-martial to take into consideration circumstances of modification which may arise on the evidence, although they tend in a certain degree to vary the nature of the charge; by the first, the

Intent of prisoner may be found.

precise intent of the prisoner in committing an offence may be found, where the nature of the crime depends on

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intention; by the second, on failure of proof of the greater, the prisoner may be found guilty of a lesser offence of the same character. May be convicted of lesser offence.

Offences punishable by ordinary law may be divided into two classes: felonies and misdemeanors.

Felony signifies an offence which formerly occasioned a total forfeiture of either lands or goods, or both, at the common law, and to which capital punishment was annexed. Felony.

Misdemeanor, in its usual acceptation, is applied to any crime less than a felony and for which the law has not provided a particular name, and the word is generally used in contradistinction to felony. Misdemeanor.

Numerous statutes have affixed specific punishments to every kind of felony, and almost to every possible misdemeanor;[1] and as the legal punishments, whether prescribed by ordinary law or by the Naval Discipline Act, will be found annexed to the description of each felony or misdemeanor hereinafter enumerated, the technical meaning of the terms will prove of very little practical importance.

There are many minor offences summarily punishable by ordinary law which will not be noticed in this work, as similar offences would in the navy be punished under the provisions of sec. 43, as prejudicial to good order and naval discipline. Punishment for minor offences.

Where two or more are to be brought to justice for one and the same felony, they are to be considered in the light of either—1. Principals; 2. Accessories before the fact; 3. Accessories after the fact.[2] Principals and accessories.

Principals in the first degree are those who have *actually and with their own hands committed the fact.* Principals in the second degree are those who were *present aiding and abetting* at the commission of the fact. Principals.

[1] See Table of Offences.
[2] Fost. 417.

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They are generally termed *aiders and abettors*, sometimes accomplices : but the latter appellation will not serve as a term of definition, as it includes all the *participes criminis*, whether they are considered in strict legal propriety as principals in the first or second degree, or merely as accessories before or after the fact. But the presence need not be a strict actual immediate presence, such as would make each an eye-witness or ear-witness of what passes, but may be a constructive presence. So that if several persons set out together, or in small parties, upon one common design, be it murder or other felony, or for any other purpose unlawful in itself, and each takes the part assigned to him: some to commit the fact, others to watch at proper distances and stations to prevent a surprise, or to favour, if need be, the escape of those more immediately engaged, they are all, provided the fact be committed in the eye of the law, present at it; for it was made a common cause with them ; each man operated in his station at one and the same instant towards the same common end, and the part each man took tended to give countenance, encouragement and protection to the whole gang, and to insure the success of their common enterprise ;[1] but there must in any case be *some participation* in the fact. So, if several are out for the purpose of committing a felony, and upon alarm and pursuit run different ways, and one of them maim a pursuer to avoid being taken, the others are not principals in the maiming.[2] Going towards the place where a felony is to be committed in order to assist in carrying off the property, and assisting accordingly, will not make the party a principal, if he was at such a distance, at the time of the felonious taking, as not to be able to assist in it.[3]

[1] Fost. 350.
[2] *R.* v. *White and Richardson* (1806), R. & R. 99.
[3] *R.* v. *Kelly* (1820), R. & R. 421.

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Accessories before the fact.

An accessory before the fact is he who, being *absent* at the time of the offence committed, does yet procure, counsel, hire, command, or abet another to commit a felony. Accessories before the fact are punishable as principals.[1]

The term accessory is in practice confined to cases of felony. It is not used with reference to high treason.

Accessories after the fact.

An accessory after the fact is a person who, knowing a felony to have been committed by another, receives, relieves, comforts, or assists the felon. Also, whoever rescues a felon from an arrest for the felony, or voluntarily and intentionally suffers him to escape, is an accessory to the felony.

In order to support a charge of receiving, harbouring, comforting, assisting, and maintaining a felon, there must have been some act proved to have been done to assist the felon personally. It is also necessary, to constitute the offence, that the accessory have notice, direct or implied, at the time he assists or comforts the felon, that he had committed a felony.[2] That if one wounds another mortally, and after the wound is given, but before death ensues, a person assists or receives the delinquent, this does not make him accessory to the homicide, for till death ensues that felony is not committed.[3]

Punishment.

Accessories after the fact to felonies are punishable with imprisonment for any term not exceeding two years, with or without hard labour.[4]

Several accessories.

Any number of accessories at different times to any felony, and any number of receivers at different times of property stolen at one time may be charged with substantive felonies and may be tried together, notwithstanding

[1] 24 & 25 Vict. c. 94, s. 1.
[2] 2 Hawk. c. 29, s. 32.
[3] Russ., 7th ed., 128.
[4] 24 & 25 Vict. c. 94, s. 4.

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that the principal felon is not included, and is not in custody or amenable to justice.[1]

Abettors in misdemeanors.

Any person who shall aid, abet, counsel, or procure the commission of any misdemeanor shall be liable to be tried and punished as a principal offender.[2]

Natural presumption of sanity.

Every person at the age of discretion is, unless the contrary be proved, presumed by law to be sane, and to be accountable for his actions, and the burden of proving that he is irresponsible is upon the prisoner; but the court-martial may have regard to his appearance and behaviour in court.[3] If there be an incapacity, or defect of the understanding, as there can be no consent of the will, so the act cannot be culpable. Whether the prisoner was sane or insane at the time the act was committed is a question of fact, and is dependent upon the previous and contemporaneous acts of the party. Evidence of insanity of ancestors or blood relations is admissible. So is evidence of illness exhausting the brain. Medical evidence is not essential. Mere absence of any evidence of motive for a crime is not a sufficient ground upon which to infer mania. Upon a question of insanity, a witness of medical skill may be asked whether, assuming certain facts, proved by other witnesses, to be true, they, in his opinion, indicate insanity, but not whether, having heard the whole evidence, he is of opinion that the prisoner at the time he committed the alleged act was of unsound mind. The case of persons who are found to be insane, either at the time of the offence or trial, is provided for by sec. 68 of the N. D. Act, which is as follows :—

Case of insane prisoners.

"Where it shall appear upon the trial by court-martial of any person charged with an offence that such person is insane, the court shall find specially the fact of his insanity, and shall order such person to be kept in strict custody in such place and in such manner as to the court shall seem fit, until the directions of the

[1] 24 & 25 Vict. c. 94, s. 6.
[2] Ibid. s. 8.
[3] *R.* v. *Oxford* (1840), 9 C. & P. 525 ; *R.* v. *Stokes* (1848), 3 C. & K. 185.

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Admiralty thereupon are known; and it shall be lawful for the Lords of the Admiralty to give orders for the safe custody of such person during her Majesty's pleasure, in such place and in such manner as they shall think fit."

Rules of the judges for the determination of insanity.

The question of insanity is often a very difficult one, particularly where the person charged is subject to partial delusions : in all such cases the state of mind of the prisoner must be determined under the guidance of the rules laid down by the judges in answer to the questions propounded by the House of Lords in *McNaughten's case*;[1] the most important of these are, 1st. "Every man is presumed to be sane, and to possess a sufficient degree of reason to be responsible for his crimes, until the contrary be proved : and, to establish a defence on the ground of insanity, it must be clearly proved that at the time of the committing of the act, the party accused was labouring under such a defect of reason from disease of the mind, as not to know the nature and quality of the act he was doing, or if he did know it, that he did not know that he was doing what was wrong; for if the accused was conscious that the act was one which he ought not to do, and if that act was at the same time contrary to the law of the land, he is punishable."

2ndly. "Where a person labours under partial delusions in respect of one or more particular subjects or persons, and is not in other respects insane, and does the act complained of with a view, under the influence of insane delusion, of redressing or revenging some supposed grievance or injury, or of producing some public benefit, he is nevertheless punishable according to the nature of the crime committed, if he knew at the time of committing such crime that he was acting contrary to the law of the land."

3rdly. "Where the person accused labours under

[1] (1843), 4 St. Tr. (N. S.) 847.

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such partial delusion only (as in the last case), but is not in other respects insane, he must be considered in the same situation as to responsibility as if the facts, with respect to which the delusion exists, were real. For example, if under the influence of his delusion, he supposes another man to be in the act of attempting to take away his life, and he kills that man, as he supposes, in self-defence, he would be exempt from punishment. If his delusion was that the deceased had inflicted a serious injury to his character and fortune, and he killed him in revenge for the supposed injury, he would be liable to punishment."

Lastly. "Where the facts are admitted, or not disputed, and the question becomes substantially one of science only, a medical man conversant with the disease of insanity, who never saw the prisoner previously to the trial, but who was present during the whole trial and the examination of all the witnesses, may be asked his opinion as to the state of the prisoner's mind at the time of the commission of the alleged crime, or his opinion whether the prisoner was conscious, at the time of doing the act, that he was acting contrary to law, or whether he was labouring under any, and what, delusion at the time?"

Drunkenness is not a defence to a charge of crime unless it amounts to unsoundness of mind or has produced in the defendant a mental or physical condition inconsistent with the inference that acts done by him under the influence of drink were intentional, where intent or premeditation is of the essence of the crime.[1] A man who, while suffering from *delirium tremens*, feloniously wounded another, was held to have been insane when he committed the act,[2] and the same has been held in a case of temporary mental derangement caused by

[1] *R.* v. *Meade*, [1909] 1 K. B. 895, 898.
[2] *R.* v. *Davis* (1881), 14 Cox, 563.

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drink.[1] A person may be so drunk as to be utterly unable to form any intention at all, and yet he may be guilty of very great violence.[2] But if there is really a previous determination to resent a slight affront in a barbarous manner, the state of drunkenness in which the prisoner was ought not to be regarded, for it would furnish no excuse. If a person receives a blow, and immediately avenges it with any instrument he may happen to have in his hand, and death ensues, this will be only manslaughter, provided the fatal blow is to be attributed to the passion of anger arising from the previous provocation.

Crimes committed under compulsion.

An act may also be excused if committed by a person acting in company with others, provided that he is compelled to act as he does by threats of death or serious injury, continued during the whole time that he so acts.

Plea of necessity.

In extreme cases an act may sometimes be justified on the plea of necessity, if it be done by a person in order to avoid inevitable and irreparable evil to himself, or those whom he is bound to protect, though, of course, the act must not be disproportionate to the end to be attained, nor must more be done than is absolutely necessary to attain that end.

Responsibility for result of action.

Where a person has no excuse to prevent his being criminally responsible for the result of his actions, his responsibility will not be limited to the simple case where he is present, and actually commits an offence with his own hand. Thus if a sailor negligently leaves a ball cartridge mixed with blank cartridges, he will be responsible if injury results.

Action through an innocent agent.

Again, when a person does an act by means of an innocent agent, as if a sailor knowing a note to be forged induces a comrade, who does not know it to be forged, to get it changed, or if a sailor, knowing that a pair of

[1] *R.* v. *Baines*; cited in Wood-Renton on Lunacy, 912.
[2] *R.* v. *Cruse* (1838), 8 C. & P. 541, 546.

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boots does not belong to him, induces a comrade to steal them by representing that they were his property, and not the property of the actual possessor, the sailor, but not his comrade, is responsible.

Responsibility for instigation.

A person is in all cases fully responsible for any offence which is committed by another by his instigation; even though the offence may be committed in a different way from the one that he suggested. Further, he is responsible for any other offence which may, and was likely to, result from such instigation, as, for instance, murder in the course of a robbery which he had instigated. But a person will not be responsible for an offence which he may have instigated another to commit, if he countermanded its execution, and notice of the countermand was received by the person instigated before the commission of the offence; nor, where he instigates one offence, will he be responsible for the commission of another unconnected therewith. Though the execution of the crime was countermanded, the instigator would still be liable to be prosecuted for the misdemeanour of inciting to commit an offence, though not for the offence itself.

Persons in subjection to the power of others.

Persons are properly excused from those acts which are not done of their own free will, but *in subjection to the power of others*. Thus, although the fear of having houses burned, or goods spoiled, is no excuse in law for going and marching with rebels, yet an actual force upon the person, and present fear of death, may form such an excuse, provided they continue all the time during which the party remains with the rebels.[1]

Offences against the Person.

Murder.

Murder is "where a person of sound mind unlawfully kills any reasonable creature in being with malice aforethought either expressed or implied.[2]

[1] *R.* v. *Tyler* (1838), 8 C. & P. 616.
[2] Coke, 3 Inst. 47.

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Malice, in its legal sense, denotes a wrongful act done intentionally without just cause or excuse. Malice.

Express malice is, when one person kills another with a sedate deliberate mind, and formed design. Express malice.

Malice is implied by law from any deliberate fact committed by one person against another, however sudden—for every reasonable person is deemed responsible for the probable consequences of his act: thus where a man kills another suddenly without any or without a considerable provocation, the law implies malice. Implied malice.

It should also be remarked, that where the defence rests upon some violent provocation, it will not avail, however grievous such provocation may have been, if it appears that there was an interval of reflection, or a reasonable time for the blood to have cooled, before the deadly purpose was effected. Provocation.

If a man be sick of some disease, which by the course of nature might possibly end his life within a short period, and another gives him a wound or hurt which hastens his death by irritating and provoking the disease to operate more violently or speedily, that is murder, or other homicide according to the circumstances, in the party by whom such wound or hurt was given.[1] Killing a person labouring under disease.

If two persons deliberately fight a duel, and one of them be killed, the other and both the seconds are guilty of murder, no matter how grievous the provocation, or by which party it was given.[2] A deliberate duel.

If an action, unlawful in itself, be done deliberately, or with intention of mischief or great bodily harm to particular individuals, or of mischief indiscriminately, fall where it may, and death ensue against or beside the original intention of the party, it will be murder. Acts done with intention of mischief.

[1] 1 Hale, 428.
[2] *R.* v. *Young* (1838), 8 C. & P. 645.

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Aiders and abettors.

A person may also be a principal as an aider and abettor; and in order to be so to a murder, or manslaughter, he must be present aiding and abetting the fact committed. The presence, however, need not always be an actual standing by within sight or hearing of the fact: for there may be a constructive presence, as when one commits a murder, and another keeps watch or guard at some convenient distance.

Accessories before the fact in murder.

He that counsels, commands, or directs the killing of any person, and is himself absent at the time of the fact being done, is an accessory to murder before the fact.[1] And it is a rule that he who in any wise commands or counsels another to commit an unlawful act, is accessory to all that ensues upon that unlawful act; but the crime committed must be the direct and immediate effect of the act done in pursuance of the command.[2]

Punishment for murder.

The punishment for murder is death (Naval Discipline Act, s. 45), subject to the limitations of sec. 53 (Nos. 1, 2, 3). By sec. 48, prisoners may be found guilty of manslaughter, or of a common assault.

Time of death.

With respect to the time of death, it is agreed that no person shall be adjudged by any act whatever to kill another, who does not die thereof within a year and a day after the stroke received or cause of death administered.[3]

Accessories after the fact in murder.

An accessory after the fact in murder, as in any other felony, is, where a person knowing a murder to have been committed, receives, relieves, comforts, or assists the offender: also whoever rescues a felon from arrest for the felony, is an accessory to the felony. In murder an accessory after the fact is liable, at the discretion

Punishment.

of the court, to penal servitude for life, or not less than

[1] 1 Hale, 435.
[2] 2 Hawk. P. C. c. 29, s. 18.
[3] 24 & 25 Vict. c. 94, s. 1.

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three[1] years, or to be imprisoned for any term not exceeding two years, with or without hard labour.[2]

Manslaughter. Manslaughter is the unlawful and felonious killing of another without any malice, either express or implied.

The cases falling under the head of manslaughter are: (1) Where death ensues from actions in themselves unlawful, but not proceeding from a malicious or felonious intention; (2) From actions in themselves lawful, but done without due care and circumspection, for preventing mischief; (3) Where death ensues upon a sudden combat or affray; or (4) From heat of blood, upon a reasonable provocation given.

Homicide—when justifiable, or excusable. In all cases of homicide it will be the duty of the court to weigh most carefully any circumstances of alleviation, excuse, or justification, which may appear in the conduct of the prisoner, having especial regard to the distinctions already laid down between murder and manslaughter; but in some cases the killing must be considered either as excusable or justifiable.[3] No punishment is incurred by any person who kills another by misfortune, or in his own defence, or in any other manner, without felony.[4]

Using force to arrest naval offenders. In accordance with this general principle special protection is granted to those authorized to arrest offenders under the Naval Discipline Act. Sec. 50 empowers any person authorized by the warrant of the officer in command of a fleet or squadron of his Majesty's ships to arrest naval offenders, to use force, if necessary, for the purpose of effecting such apprehension.

Sodomy. If any person subject to the Naval Discipline Act is guilty of sodomy with man or beast,[5] he shall suffer penal servitude for life, or any time not less than for three years, at the discretion of the court.

[1] 54 & 55 Vict. c. 69, s. 1.
[2] 24 & 25 Vict. c. 100, s. 67.
[3] 1 Hale, 484.
[4] 24 & 25 Vict. c. 100, s. 7.
[5] N. D. Act, s. 45.

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The offence consists in carnal knowledge committed against the order of nature (*i.e.*, *per anum*) by man with man; or in the same unnatural manner with woman; or by man or woman in any manner with beast. The carnal knowledge necessary to constitute this offence is the same that is required in the case of rape. In this offence, as in rape, the crime is complete on proof of penetration only, and it is not necessary to prove emission.[1] A very slight penetration is necessary. Those who are present aiding and abetting in this offence are all liable as principals. The evidence should be plain and satisfactory, in proportion as the crime is detestable. Corroboration of the evidence of an accomplice is particularly to be required, and a conviction has been quashed where such corroboration was not forthcoming and the judge did not sufficiently warn the jury against convicting on such evidence uncorroborated.[2] In a prosecution for an unnatural offence, an admission by the prisoner that he had committed such an offence at another time, and with another person, and that his natural inclination was towards such practices, ought not to be received in evidence.[3] The perpetration of sodomy on a man against his will, or during natural sleep, is contrary to all probability. As a rule, the facts of this crime are proved without medical evidence, except in the case of the passive agent being a boy, when marks of physical violence may be apparent. Unless an examination is made soon after the perpetration of the crime, the signs of it in the passive agent will disappear.

If the complete proof fail, the prisoner may be found guilty of an indecent assault (sec. 48) and is liable to the punishment of penal servitude or to any of the inferior punishments mentioned in sec. 52 of the Naval Discipline

[1] 24 & 25 Vict. c. 100, s. 63.
[2] *R.* v. *Tate*, [1908] 2 K. B. 680.
[3] *R.* v. *Cole*, 1 Russ., 7th ed., 977.

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Act, 1866.[1] As by sec. 53 (4) the term of penal servitude for life is authorized for every offence for which penal servitude can be imposed under the Act, it is possible to award the same punishment where the prisoner is found guilty of an indecent assault only as where the full offence of sodomy is proved. Under the ordinary criminal law the maximum punishment for an assault with intent to commit sodomy or of any indecent assault upon any male person is ten years' penal servitude.[2]

Offences against the person not mentioned in the N.D.A.

There are other offences against the person not specially specified in the Naval Discipline Act. They are punishable by the laws of England and may become the subject of trial by court-martial. As, however, these offences are rarely tried by court-martial it seems unnecessary to give them more than a passing notice. A fairly complete list of crimes and their punishments is given at the end of this chapter.

By the Offences against the Person Act, 1861,[2] every one is guilty of felony and is liable upon conviction thereof to penal servitude for life, who does any of the following things *with intent to commit murder;* that is to say:

(1) by the explosion of gunpowder or other explosive substance, destroys or damages any building;[3]

(2) sets fire to any ship or vessel, or any part thereof, or any part of the tackle, apparel, or furniture thereof, or any goods or chattels being thereon, or casts away or destroys any ship or vessel;[4]

(3) is accessory after the fact to any murder.[5]

Every one is guilty of felony and is liable to penal servitude for life who unlawfully and maliciously prevents

[1] 29 & 30 Vict. c. 109.
[2] 24 & 25 Vict. c. 100, s. 62.
[3] Ibid. s. 12.
[4] Ibid. s. 14.
[5] Ibid. s. 67.

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or impedes any person being on board of or having quitted any ship or vessel which shall be in distress, or wrecked, stranded, or cast on shore, in his endeavour to save his life, or prevents or impedes any person in his endeavour to save the life of any person so situated.[1]

Blowing up buildings.

Every one is guilty of felony, and is liable on conviction to fourteen years' penal servitude, who unlawfully and maliciously places or throws in, into, upon, against, or near any building, ship or vessel any gunpowder, or other explosive substance, with intent to do any bodily injury to any person, whether or not any explosion takes place, and whether or not any bodily injury is effected.[2]

Public indecencies.

Every one commits a misdemeanor who does any grossly indecent action in any open and public place in the presence of more persons than one.[3] If the act done is a public and indecent exposure of the person the offender may on conviction be sentenced to hard labour[4]; but it is uncertain whether such conduct in a public place amounts to a misdemeanor if it is done when no one is present, or in the presence of one person only.[5]

Outrages on decency.

Any male person who, in public or private, commits, or is a party to the commission of, or procures or attempts to procure the commission by any male person of any act of gross indecency with another male person, shall be guilty of a misdemeanor, and being convicted thereof shall be liable, at the discretion of the court, for any term not exceeding two years, with or without hard labour.[6] The evidence of the other male person, if a consenting party, needs corroboration.[7] The unsworn

[1] 24 & 25 Vict. c. 100, s. 17.
[2] Ibid. s. 30.
[3] 1 Hawk. P. C. 358.
[4] 14 & 15 Vict. c. 100, s. 29.
[5] A place is public within the meaning of this provision if it is so situated that what passes there can be seen by any considerable number of persons if thay happen to look: *Webb's Case* (1848), 1 Den. 338; *R.* v. *Holmes* (1853), D. & P. 207.
[6] 48 & 49 Vict. c. 69, s. 11.
[7] *R.* v. *Tate*, [1908] 2 K. B. 680.

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evidence of a child of tender years is admissible on a charge under this section, but must be corroborated.[1]

Assaults with intent to commit sodomy.

Every one is guilty of a misdemeanor, and is liable on conviction thereof to ten years' penal servitude, who is guilty of any assault with intent to commit sodomy or of any indecent assault upon any male person.[2]

Assaults on persons protecting wrecks.

Every one is guilty of a misdemeanor, and is liable on conviction thereof to seven years' penal servitude, who assaults and strikes or wounds any magistrate, officer, or other person lawfully authorized in or on account of the exercise of his duty in or concerning the preservation of any vessel in distress, or of any vessel, goods, or effects wrecked, stranded, or cast on shore, or lying under water.[3]

Maintenance of discipline.

The law also permits force to be used for correction or for the maintenance of discipline. The officer in command of a ship on a voyage may use force for the maintenance of discipline. In all such cases the force used must be reasonable and not excessive, otherwise the person using the force will be fully responsible for the consequences.

Difference in offences.

In trying any charges of the above descriptions it will be requisite for the members of the court to bear in mind the provisions of secs. 47 and 48, as respects the intent with which the offence is committed, and the finding of the prisoner guilty of the lesser on the charge of the greater offence.

Offences against Property.

Punishments for robbery or theft.

If any person subject to the Naval Discipline Act is guilty of robbery or theft he shall suffer penal servitude[4] for life or any term of not less than three years, or

[1] 8 Edw. 7, c. 67, s. 30, and Sched. I.
[2] 24 & 25 Vict. c. 100, s. 62.
[3] Ibid. s. 37.
[4] Sec. 45.

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imprisonment for any term not exceeding two years, with or without hard labour, or any of the punishments under secs. 52 and 56, always bearing in mind that no officer, petty or non-commissioned officer, shall be subject to corporal punishment for these offences, nor any officer be tried summarily.

Robbery.

Robbery is an aggravated species of larceny, and consists in the felonious[1] and forcible taking from the person of another, or in his presence and against his will, of any property[2] to any value, by violence, or putting him in fear.[3]

The gist of the offence of robbery is the taking by force and terror, and not the value of the property taken: a penny as well as a pound forcibly extorted makes a robbery.[4] Thus the taking of a slip of paper, which contained a memorandum of a sum of money due to the prosecutor, has been held sufficient.[5] Something of some value must be taken, otherwise the offence will be only an assault with intent to rob; but the value need not be estimable by any known coin, even a farthing.[6]

Robbery with violence.

Every one is guilty of felony and is liable, upon conviction thereof, to be kept in penal servitude for life (1) who, being armed with any offensive weapon or instrument, robs or assaults with intent to rob any person, or being together with any person or persons, robs or assaults with intent to rob any person, or (2) who robs any person, and at the time of, or immediately before, or immediately after such robbery wounds, beats, strikes, or uses any violence to any person.[7]

[1] The word "felonious" is to be taken to mean that there is no colour of right to excuse the act.

[2] "Property" may be interpreted in its widest signification as anything to which another has the right of possession.

[3] 2 Russ., 7th ed., 1137; 1 Hawk. P. C. c. 34.

[4] 3 Co. Inst. 69.

[5] *R.* v. *Bingley* (1835), 5 C. & P. 602.

[6] *R.* v. *Morris* (1840), 9 C. & P. 349.

[7] 24 & 25 Vict. c. 96, s. 43. An offender may also be sentenced to be whipped: 26 & 27 Vict. c. 44.

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Robbery or stealing from the person.

Every one is guilty of felony, and is liable upon conviction thereof to be kept in penal servitude for fourteen years, who robs any person, or steals any chattel, money, or valuable security from the person of another.[1] If upon trial of any person for robbery it appears upon the evidence that the prisoner did not commit the crime of robbery, but that he did commit an assault with intent to rob, he may be found guilty of an assault with intent to rob.[2]

Assault with intent to rob.

Every one is guilty of felony, and is liable upon conviction thereof to be kept in penal servitude for five years,[3] who assaults any person with intent to rob.[4]

Larceny or theft.

Larceny or theft may be defined as the wilfully wrongful or fraudulent taking possession of and carrying away of the personal goods of another from any place, with a felonious intent to convert them to the taker's own use and make them his own property *without the consent of the owner;* the intent must be to deprive the owner, not temporarily, but permanently, of his property.[5] There must not only be a taking, but also a carrying away, to constitute theft. A bare removal, however, from the place in which the thief found the goods, though he does not make off with them, is a sufficient carrying away.[6] Theft may be committed by taking and carrying away without the consent of the owner (even if he expects and affords facilities for the commission of the offence) anything which is not in the possession of the thief at the time when the offence is committed, whether it is in the possession of any other person or not.

Theft not purged by a return of the stolen articles.

Where there has once been a sufficient taking of the goods by the thief, the offence is completed, and will not

[1] 24 & 25 Vict. c. 96, s. 40.
[2] Ibid. s. 41.
[3] 54 & 55 Vict. c. 69, s. 1.
[4] 24 & 25 Vict. c. 96, s. 42.
[5] *R.* v. *Thurborn*, 1 Den. 388.
[6] 1 Hawk. P. C. c. 33, s. 18.

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be purged by a returning of the goods either in the case of theft or robbery. Larceny is a felony, and, except in cases otherwise provided for, is punishable with penal servitude for five years.[1]

Theft by "finding."

There are four classes of cases of not unfrequent occurrence, which require a more particular consideration: (1) Where a man loses goods, and another finds them, and not knowing the owner converts them to his own use. The true rule on this subject is, that "if a man finds goods that have been actually lost, or are reasonably supposed by him to have been lost, and appropriates them with intent to take the entire dominion over them, really believing when he takes them that the owner cannot be found, it is not theft; but if he takes them with the like intent, though lost, or reasonably supposed to be lost, *but reasonably believing that the owner can be found*, it is theft.[2]

Theft by a "bailee."

(2) Where the possession of goods has been obtained *bonâ fide*, without any fraudulent intention in the first instance, as where they are delivered to a man upon trust, or taken by him with the owner's consent, but subsequently appropriated fraudulently to his own use.

Appropriation of money paid by mistake.

(3) A somewhat similar but more difficult question arises where money which is not due to a man, or more money than is due, is paid to him by mistake, and he adopts the payment and appropriates the money. In a recent case before the Court for Crown Cases Reserved in Ireland, it was held by five judges against four, that where a man handed to the person a 10*l.* note in mistake for a 1*l.* note, and the prisoner took the note thinking it was a 1*l.* note, and, when he afterwards discovered the error, kept it, he could not be convicted of larceny.[3] If

[1] 24 & 25 Vict. c. 96, s. 4; 54 & 55 Vict. c. 69, s. 1.
[2] *R.* v. *Thurborn* (1849), 18 L. J. M. C. 144, *per* Baron Parke; see also *R.* v. *Mortimer* (1908), 72 J. P. 349.
[3] *R.* v. *Helier* (1895), 2 Ir. 709.

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the mistake is only on the side of the person paying the money, and the recipient is at the time fully aware of and takes advantage of it, he is guilty of larceny.[1]

Larceny by a trick.

(4) Theft may be committed by fraudulently obtaining from the owner a transfer of the possession of a thing, the owner intending to reserve to himself his property therein, and the offender intending, at the time when the possession is obtained, to convert the thing without the owner's consent to such conversion.[2] "The offences of larceny by a trick, larceny by a person as bailee, and obtaining goods by false pretences, are often almost undistinguishable under the circumstances of particular cases, but the crucial point for the purpose of establishing larceny by a trick as distinguished from larceny by a bailee seems to me that there should have been an intention at the moment of obtaining possession of the goods then and there to steal them."[3]

Larceny or theft from vessels, docks, &c.

Stealing from vessels, barges, or boats of any description, in a haven, port of entry or discharge, or upon a navigable river or canal, is punishable by penal servitude to the extent of fourteen years. The same punishment attends stealing from a dock, wharf, or quay adjacent to any such haven, port, river, canal, creek, or basin.[4]

Larceny from vessels in distress or wrecked.

To plunder or steal any part of a ship or vessel in distress, or wrecked, or stranded, or cast on shore, or any goods, merchandise, or articles of any kind belonging to such ship or vessel, is punishable by penal servitude to the extent of fourteen years.[5]

Larceny by those in the public service.

The nature of their position considerably aggravates the offences of persons who are expected to take the lead in the prevention of crime. For any one employed in the public service of his Majesty to steal any chattel, money,

[1] *R.* v. *Middleton* (1873), L. R. 2 C. C. R. 38.
[2] *R.* v. *Hollis* (1883), 12 Q. B. D. 25, a case of "ringing the changes."
[3] *Oppenheimer* v. *Frazer*, [1907] 2 K. B. 73, *per* Moulton, L.J.
[4] 24 & 25 Vict. c. 96, s. 63.
[5] Ibid. s. 64.

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or valuable security, belonging to, or in the possession or power of his Majesty, or entrusted to, or received or taken into possession by the offender by virtue of his employment, is punishable by penal servitude to the extent of fourteen years.[1]

Fraudulent misappropriation of property.

Every one is guilty of a misdemeanor, and is liable to penal servitude for seven years, who (1), being entrusted, either solely or jointly with any other person, with any property, in order that he may retain in safe custody, or apply, pay, or deliver, for any purpose, the property or any part thereof; or (2) having, either solely or jointly with any other person, received any property for or on account of any other person: fraudulently converts to his own use or benefit, or the use or benefit of any other person, the property or any part thereof or any proceeds thereof.[2]

Tests of theft.

In all cases of theft the principal questions which will arise, will be: whether the prisoner took the goods knowingly, or by mistake; whether he took them *bonâ fide* under a claim of right, or otherwise; whether he took them with an intent to return them to the owner, or fraudulently, with an intent to deprive the owner of them altogether, and to appropriate them, or convert them, to his own use; whether he took them rightfully in the first instance, but subsequently appropriated them to his own use, or otherwise. All these questions must be determined by the court upon a review of the particular facts of each case, always remembering that, by sec. 48 of the Naval Discipline Act, upon a charge of theft, a court-martial may find the prisoner guilty of an attempt to thieve, or of embezzlement, or of wrongful appropriation of property belonging to another. In the event of such a finding, the prisoner will be liable to such punishment as might have been awarded to

[1] 24 & 25 Vict. c. 96, s. 69.
[2] 1 Edw. 7, c. 10, s. 1.

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him by any competent criminal tribunal. [See table, p. 223.]

Evidence as to theft.

The inference that property alleged to have been stolen has in fact been stolen may be drawn from other facts than the fact that it is identified by a witness. The inference that an accused person has stolen property or has received it, knowing it to be stolen, may be drawn from the fact that it is found in his possession after having been stolen, and that he gives no satisfactory account of the way in which it came into his possession.

There are some other offences against property not specified in the Naval Discipline Act, but punishable by the laws of England, which will require notice, and the offenders may be punished under the Naval Discipline Act either summarily, or be sentenced by court-martial to such punishment as any competent civil tribunal might award as hereinafter mentioned.

Taking out marks from public stores.

Every one commits felony, and is liable upon conviction thereof to seven years' penal servitude, who, with intent to conceal his Majesty's property in any stores under the care, superintendence, or control of a Secretary of State, or the Admiralty, or any public department or office, or of any person in the service of his Majesty, takes out, destroys, or obliterates, wholly or in part, any mark described in the first schedule to the Public Stores Act, 1875,[1] or any mark whatsoever denoting the property of his Majesty in any stores.[2]

Sacrilege.

Every one commits a felony, and is liable upon conviction thereof to penal servitude for life, who breaks[3] and enters any church, chapel, meeting-house, or other place of divine worship.[4]

Burglary.

Burglary is a felony at common law[5] and by statute. Every one is guilty of burglary who enters the dwelling-

[1] 38 & 39 Vict. c. 25.
[2] Ibid. s. 5.
[3] See p. 198.
[4] 24 & 25 Vict. c. 96, s. 50.
[5] See footnote, p. 204.

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house of another with intent to commit any felony therein, or being in such dwelling-house commits any felony therein and in either case breaks out of the said dwelling-house in the night.[1] The night for the purpose of this statute commences at nine o'clock of each day, and concludes at six o'clock on the morning of the next succeeding day.[2]

Punishment.

The punishment for burglary is penal servitude for life, or for any term not less than three[3] years, or imprisonment for any term not exceeding two years, with or without hard labour, and with or without solitary confinement.[4]

Definition of burglary.

Breaking in.

To constitute the offence of burglary, the place must not be a dwelling house and there must be both breaking and entering, and both must be in the night-time. If the breaking is effected in the day and entry in the night, or *vice versâ*, the offence is not burglary.[5] The offence is then housebreaking. If two persons agree to commit a burglary and one alone breaks in, on one night, and the other enters in his absence on the next night, both are guilty of the whole offence.[6]

Housebreaking.

But if the breaking with intent to commit a felony is on one night, and the entry with the like intent on a subsequent night, this is burglary. Where *breaking* is proved, but *entry* is not, the accused may be convicted of an attempt to commit burglary.[7] If a man enters a house by a door or window which he finds open, or through a hole which was made there before, and steals goods, or draws goods out of a house through such door, window, or hole, he is not guilty of burglary.[8] There must either be (1) an actual breaking of some part of the

[1] 24 & 25 Vict. c. 96, s. 51.
[2] Ibid. s. 1.
[3] 54 & 55 Vict. c. 69, s. 1.
[4] 24 & 25 Vict. c. 96, s. 52; 27 & 28 Vict. c. 47, s. 2.
[5] 1 Hale P. C. 551.
[6] *R.* v. *Jordan* (1836), 7 C. & P. 432.
[7] *R.* v. *Spanner* (1872), 12 Cox, 155.
[8] 3 Co. Inst. 64.

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house, in effecting which some actual force is employed; or (2) a breaking by construction of law, *i.e.*, an entrance obtained by threats, fraud, or conspiracy.

The breaking may be either actual or constructive.

An actual breaking is where the offender, for the purpose of getting admission for any part of his body, or for a weapon, or other instrument, in order to effect his felonious intention, breaks a hole in the wall of the house, breaks a door or window, picks the lock of a door or opens it with a key, or even by lifting the latch, or unlooses any other fastening to doors or windows, which the owner has provided. And the breaking necessary to constitute burglary is not restricted to a breaking of the outer wall, or doors, or windows of a house; if the thief gets admission into the house by the outer door or window being open, and afterwards breaks or unlocks an inner door, for the purpose of entering one of the rooms in the house, it is burglary. So, if a servant open his master's chamber door, or the door of any other chamber not immediately within his trust, with a felonious design; or if any other person lodging in the same house, or in a public inn, open and enter another's door with such evil intent, it is burglary.

A constructive breaking is, where the offender, with intent to commit a felony, obtains admission by some artifice or trick, for the purpose of effecting it. As, for instance, if a man knock at a door, and upon its being opened rush in with a felonious intent; or upon pretence of taking lodgings, fall upon the landlord and rob him.

Breaking and entering must be of dwelling-house.

The breaking and entering must be of a mansion or dwelling-house, not a shop or office. Burglary cannot be committed by breaking into any enclosed ground, or booth, or tent, though the owner may lodge therein; for the law regards thus highly nothing but permanent edifices; and the lodging of the owner in so frail a tenement no more makes it burglary to break it open than

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it would be to uncover a tilted waggon in the same circumstances.[1] Unless the owner has taken possession of the house by inhabiting it personally, or by some one of his family, it is not his dwelling-house so as to be the subject of burglary. To constitute a burglary there must be an intent to commit some felony (not necessarily a larceny) in the dwelling-house, otherwise the breaking and entry will only amount to a trespass. It must be either proved from evidence of the actual commission of the felony, or implied from some overt act if the felony is not actually carried out.

Embezzlement.

Embezzlement *of public stores* is provided for by the Naval Discipline Act, s. 33, but a similar offence against individuals committed by clerks or servants may be dealt with either under the Naval Discipline Act, or under 24 & 25 Vict. c. 96, s. 68, which enacts, "that whosoever being a clerk or servant, or being employed for the purpose or in the capacity of a clerk or servant, shall fraudulently embezzle any chattel, money, or valuable security, which shall be delivered to, or received, or taken into possession by him for or in the name or on account of his master or employer, or any part thereof, shall be deemed to have feloniously stolen the same from his master or employer, although such chattel, money, or security was not received into the possession of such master or employer, otherwise than by the actual possession of his clerk, servant, or other person so employed."

A servant who steals money or goods after they have come to the possession of his master, although they may be in the servant's custody, is guilty of larceny; but a servant who fraudulently intercepts money or goods before they come into his master's legal possession and converts them to his own use commits the offence of embezzlement.

[1] 1 Hale, 557.

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If upon the trial of a person indicted for embezzlement it is proved that he took the property in such a manner as to amount in law to larceny, he may be found guilty of simple larceny, or of a larceny as a clerk, or as a person employed in the public service, as the case may be, and he is then punishable as if he had been convicted on an indictment for such larceny.[1]

Punishment.

Punishment: penal servitude for any term not exceeding fourteen nor less than three years, or imprisonment for any term not exceeding two years, with or without hard labour, and with or without solitary confinement.[2] The punishment a court-martial can award where the person is charged under sec. 33 of the Naval Discipline Act is imprisonment or other less punishment.

Ingredients of embezzlement.

There are two facts which must always be proved in support of this charge: (1) That the prisoner received the money, &c., for, or in the name, or on account of his master, by virtue of his employment as such clerk or servant: a temporary employment in either capacity is sufficient. (2) That he embezzled the money, &c.

Evidence.

To rebut a defence that errors in a clerk's account were accidental or innocent, evidence may be given of other similar errors made in his own favour by the prisoner.[3] There must be evidence that specific sums have been received and have been embezzled and not accounted for. It is not sufficient to show a general deficiency without proving the specific sums, or some of them, constituting such deficiency.[4]

The usual evidence given of the appropriation is, that having received the money, &c., the prisoner denied the receipt or accounted for other moneys received at the same time or after, and not for it, or rendered a false account,

[1] 24 & 25 Vict. c. 96, s. 72; *R.* v. *Rudge* (1874), 13 Cox, 17.
[2] 24 & 25 Vict. c. 96, s. 68.
[3] *R.* v. *Richardson* (1868), 2 F. & F. 343; *R.* v. *Stephens* (1888), 16 Cox, 387.
[4] *R.* v. *Jones* (1838), 8 C. & P. 288.

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or practised some other deceit in order to prevent detection. The mere non-payment to the master of money which the prisoner has charged himself in his master's book with receiving is not by itself a sufficient evidence of embezzlement.[1] But, on the other hand, it is no defence merely to show that he entered the receipt correctly in the master's book if there is other sufficient evidence of a fraudulent intention.[2] If, instead of denying the appropriation of property, the prisoner, in rendering his account, admits the appropriation, alleging a right in himself, no matter how unfounded, or setting up an excuse, no matter how frivolous, he ought not to be convicted of embezzlement.[3] But where it is the prisoner's duty, at stated times, to account for *and pay over* to his employer the moneys received during those intervals, his wilfully omitting to do so is embezzlement, and equivalent to a denial of the receipt of them.[4]

Falsification of accounts.

Any clerk, officer, or servant, or any person employed or acting in the capacity of a clerk, officer, or servant, is guilty of a misdemeanor, and liable to penal servitude for seven years, who (1) wilfully and with intent to defraud, destroys, alters, mutilates, or falsifies any book, paper, writing, valuable security or account which belongs to or is in the possession of his employer, or has been received by him for or on behalf of his employer, or who (2) wilfully and with intent to defraud, makes or concurs in making any false entry in, or omits or alters, or concurs in omitting or altering, any material particular from or in any such book, or any document or account.[5]

False pretences.

Every one is guilty of a misdemeanor, and is liable on conviction thereof to five years' penal servitude, who with intent to defraud obtains by any false pretence from any

[1] *R.* v. *Hodgson* (1828), 3 C. & P. 422.
[2] *R.* v. *Lister* (1856), Dears. & B. 118.
[3] *R.* v. *Norman*, (1842) C. & Mar. 501.
[4] *R.* v. *Jackson* (1844), 1 C. & K. 384.
[5] 38 & 39 Vict. c. 24, s. 1.

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other person any chattel, money, or other valuable security.[1]

Distinction between it and larceny.

It is difficult to correctly define the offence of obtaining property by false pretences. It may be defined to be the offence of obtaining property by means of a false representation made by words, writing, or conduct, that some non-existent fact exists or existed, for the purpose of inducing the prosecutor to part with his property.[2] In some cases, there would seem to be little to distinguish it from larceny; and in others to distinguish it from a mere non-criminal lie. The most intelligible distinction between false pretences and larceny has been thus set forth[3]:—"In larceny the owner of the thing stolen has no intention to part with his property therein to the person taking it, although he may intend to part with the possession; in false pretences the owner does intend to part with his property in the money or chattel, but it is obtained from him by fraud." If upon an indictment for obtaining goods, &c., by false pretences, it is proved that the defendant obtained the goods, &c., under circumstances which in law amount to larceny, he will not on that ground be entitled to an acquittal.[4] A false pretence may be made through the medium of an innocent agent, and the person who causes it to be made is punishable as if he himself made it. If the goods are obtained by means of a forged order note, or other document, the party may be indicted for forgery, the punishment for which offence is more severe. But the prisoner will not be acquitted for the false pretences on the ground that he might have been indicted for forgery.[5] In an indictment for *receiving* goods obtained by false pretences it is not necessary to specify by what false pretence the goods

[1] 24 & 25 Vict. c. 96, s. 88.
[2] *R.* v. *Wooley* (1850), 1 Den. 559.
[3] *White* v. *Garden* (1851), 10 C. B. 927.
[4] 24 & 25 Vict. c. 96, s. 88.
[5] 14 & 15 Vict. c. 100, s. 12.

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were obtained.[1] If the falsity of the pretences is known to the prosecutor, who, nevertheless, parts with his goods with the intention of entrapping the defendant, or for some other reason, the defendant cannot be convicted of obtaining the goods by false pretences.[2] But in such a case he may be convicted of attempting to obtain them.[3]

Forgery.

Forgery is the fraudulent making or altering of a written instrument for the purpose of fraud and deceit. It is a misdemeanor at common law. Cases of forgery which have not been specially dealt with by statute are left to their punishment at common law. It is only in virtue of a particular statute that any forgery is made a felony.[4] Many kinds of forgery are specifically punished by statute and made felonies, or in some cases misdemeanors only. The principal Act now regulating forgery is the Forgery Act, 1861.[5] The intent to defraud is an ingredient of the offence; but it is not necessary to prove the intention of the prisoner to have been to defraud any particular person; it is sufficient to prove generally an intent to defraud.[6] Neither is it necessary to prove that any person was actually defrauded by the forgery, if from circumstances the court can presume that it was the prisoner's intention to defraud;[7] for where the intent to defraud exists in the mind of the prisoner, it is sufficient, although from circumstances of which he is not apprised he could not in fact defraud the prosecutor.[8]

Such of the more important provisions of the Forgery Act, 1861, as are likely to affect charges before courts-martial are subjoined.

[1] *Taylor* v. *R.*, [1895] 1 Q. B. 25.
[2] *R.* v. *Mills* (1857), 7 Cox, 263.
[3] *R.* v. *Roebuck*, 25 L. J. M. C. 101; 14 & 15 Vict. c. 100, s. 9.
[4] 4 Bl. Com., 248. Wherever the term "at common law" occurs throughout the book, it means by the general law apart from any statutory enactment.
[5] 24 & 25 Vict. c. 98.
[6] Ibid. s. 44.
[7] *Ward's Case* (1719), 2 Str. 747.
R. v. *Holden* (1809), R. & R. 154.

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Definition of making a false document.

To make a false document is (1) to make a document purporting to be what in fact it is not; (2) to alter a document without authority in such a manner that if the alteration had been authorized it would have altered the effect of the document; (3) to introduce into a document without authority, whilst it is being drawn up, matter which, if it had been authorized, would have altered the effect of the document; (4) to sign a document (*a*) in the name of any person without his authority, whether such name is or is not the same as that of the person signing; (*b*) in the name of any fictitious person alleged to exist, whether the fictitious person is or is not alleged to be of the same name as the person signing; (*c*) in a name represented as being the name of a different person from that of the person signing it and intended to be mistaken for the name of that person; (*d*) in a name of a person personated by the person signing the document, provided that the effect of the instrument depends upon the identity between the person signing the document and the person whom he professes to be.[1]

Forging seals.

Forgeries Punishable with Penal Servitude for Life.—Every one commits felony, and is liable upon conviction thereof to penal servitude for life, who does any of the following things, that is to say: (1) who forges or counterfeits any of the King's seals or the stamp or impression thereof; or (2) who utters, knowing it to be forged or counterfeited, any such seal, stamp, or impression; or (3) who forges or alters, or utters, knowing it to be forged or altered, any document or instrument bearing such stamps or impressions;[2] or (4) who does any of the following things to any register of births, baptisms, marriages, deaths, or burials authorized or required by law for the time being to be kept, that is to say: destroys, defaces, or injures any such register; or forges,

Altering, &c., registers.

Forging marriage, birth, and death certificates.

[1] Steph. Dig. 324.
[2] 24 & 25 Vict. c. 98, s. 1.

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or fraudulently alters, in any such register any entry relating to any birth, baptism, marriage, death or burial, or does any of these things to any certified copy of such register; or knowingly and unlawfully inserts, or causes to be inserted in any such register, or in any certified copy thereof, any false entry of any matter relating to any such fact, or gives any false certificate relating thereto; or certifies any writing to be a copy or extract from any such register, knowing such writing, or the part of the register of which it is a copy, to be false in any material particular; or who alters any such entry, &c., knowing the same to be false, forged or altered;[1] or (5) who does any of the following things to any copy of any register required by law to be transmitted to any registrar or other officer, that is to say: knowingly and wilfully inserts, or causes or permits to be inserted therein, any false entry of any matter relating to any birth, baptism, marriage, or burial; forges or utters any such copy; knowingly and wilfully signs or verifies any such copy, knowing any part of it to be false; unlawfully destroys, defaces, or injures any such copy; unlawfully and for a fraudulent purpose takes any such copy from its place of deposit, or conceals it.[2]

Forging evidential instruments, &c.

Forgeries Punishable with Seven Years.—Every one commits felony, and is liable upon conviction thereof to seven years' penal servitude, (1) who forges or fraudulently alters, utters or disposes of any instrument, whether written or printed, made evidence by any Act of Parliament and for which offence no punishment is specifically provided;[3] or (2) who forges or fraudulently alters any licence or certificate for marriage, or offers, utters, or disposes of any such licence or certificate, knowing the same to be forged or fraudulently altered.[4]

Marriage licences, &c.

[1] 24 & 25 Vict. c. 98, s. 36.
[2] Ibid. s. 37.
[3] Ibid. s. 29.
[4] Ibid. s. 35.

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Forging Telegrams.—Every one commits a misdemeanor, and is liable to imprisonment with hard labour for twelve months, who forges or wilfully and without due authority alters or utters a telegram knowing the same to be forged, or wilfully and without due authority altered, or who transmits by telegraph as a telegram, or utters as a telegram any message which he knows to be not a telegram, whether he had or had not an intent to defraud.[1] Forging telegrams.

Malicious Injuries to Property.—Every one is guilty of felony, and must upon conviction thereof be sentenced to death, who either within this realm or in any of the islands, countries, forts, or places thereunto belonging does any of the following things, that is to say: wilfully and maliciously sets on fire, or otherwise destroys, or causes to be set on fire or burnt, or otherwise destroyed; or aids, procures, abets, or assists in setting on fire or burning or otherwise destroying (1) any of his Majesty's ships or vessels of war, whether afloat or building or begun to be built in any of his Majesty's dockyards, or building or repairing by contract in any private yards for the use of his Majesty; or (2) any of his Majesty's arsenals, magazines, dockyards, rope-yards, victualling offices, or any of the buildings erected therein or belonging thereto; or (3) any timber or materials there placed for building, repairing, or fitting out of ships or vessels; or (4) any of his Majesty's military, naval, or victualling stores or other ammunition of war; or (5) any place or places where any such military, naval, or victualling stores or other ammunition of war is, are, or shall be kept, placed, or deposited.[2] Burning ships of war.

The above section provides no other punishment than death for this offence, whilst sec. 34 of the Naval Discipline Act, which is somewhat similar, and which is of course

[1] 47 & 48 Vict. c. 76, s. 11.
[2] 12 Geo. 3, c. 24. The court may order the judgment of death to be recorded: 4 Geo. 4, c. 48.

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only applicable to persons subject to that Act, makes the offence punishable with death or one of the lesser punishments mentioned in the Act.

Malicious injuries to vessels.

Every one commits felony, and is liable on conviction to penal servitude for fourteen years, who places or throws in, against, or near a ship or vessel, any gunpowder or other explosive substance with intent to destroy the vessel, machinery, working tools, or chattels, although the explosion does not take place, and no injury is effected.[1] To damage otherwise than by fire, gunpowder, or other explosive substance, any vessel, complete or unfinished, with intent to destroy the same, or render it useless, is a felony punishable by penal servitude to the extent of seven years.[2]

Endangering vessels.

It is a felony punishable by penal servitude for life to mask, alter, or remove any light or signal, with intent to bring a vessel into danger, or to do anything tending to its immediate loss or destruction.[3] It is a felony punishable by penal servitude for seven years to cut away or otherwise interfere with any buoy, mark, &c., used or intended for the guidance of seamen or for the purpose of navigation.[4]

Destroying wrecks.

It is a felony punishable by penal servitude for fourteen years to destroy any part of a vessel in distress, wrecked or cast on shore, or any article belonging to such ship.[5]

Threats to burn, &c.

Every one commits felony, and is liable upon conviction thereof to penal servitude for ten years, who, knowing the contents thereof, sends, delivers, alters, or directly or indirectly causes to be received any letter or writing threatening to burn or destroy any house, barn, or other building or any agricultural produce, whether in or

[1] 24 & 25 Vict. c. 97, s. 45.
[2] Ibid. s. 46.
[3] Ibid. s. 47.
[4] Ibid. s. 48.
[5] Ibid. s. 49.

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under any building or not, or any ship or vessel, or to kill, maim, or wound any cattle.[1]

Arson. Arson is the unlawful, wilful, and malicious setting fire to any building. The term does not strictly comprise cases of setting fire to other things, such as corn, ships, &c., but it will be convenient to treat here of them also.

Every one commits felony, and is liable on conviction thereof to penal servitude for life, who unlawfully and maliciously does any of the following acts, that is to say: (1) who sets fire to any building;[2] or any *stack* of corn, grain, straw, any cultivated vegetable produce, furze, peat, &c.;[3] or any ship, whether in a complete or unfinished state;[4] (2) who breaks down, or otherwise damages or destroys, any sea bank, or sea wall;[5] or (3) who casts away or in anywise destroys any ship or vessel whether complete or in an unfinished state;[6] or (4) does anything tending to the immediate loss or destruction of any ship, vessel, or boat for which no punishment is otherwise provided by this Act.[7]

Attempts to set fire to. Attempting to set fire to crops or stacks under such circumstances that, if the same were set fire to, the offender would be guilty of felony, is a felony punishable by penal servitude to the extent of seven years.[8]

Personation of seamen. The false personation of seamen is provided against by the Admiralty Powers Act[9] (1865), s. 8, which enacts that if any person in order to receive any pay, wages, allotment, prize money, bounty money, grant, or other allowance in the nature thereof, half-pay, pension, or allowance from the Compassionate Fund of the navy,

[1] 24 & 25 Vict. c. 97, s. 50.
[2] Ibid. ss. 2, 3, 4.
[3] Ibid. s. 17.
[4] Ibid. s. 42.
[5] Ibid. s. 30.
[6] Ibid. s. 42.
[7] Ibid. s. 47.
[8] Ibid. s. 18.
[9] 28 & 29 Vict. c. 124.

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payable or supposed to be payable by the Admiralty, or any other money so payable, or supposed to be payable, or any effects or money in charge or supposed to be in charge of the Admiralty, falsely or deceitfully personates any person entitled or supposed to be entitled to receive the same, every such person shall be guilty of a misdemeanor, and being convicted thereof shall be liable, at the discretion of the court, to be kept in penal servitude for any term not exceeding five years,[1] or to be imprisoned for any term not exceeding two years, with or without hard labour, or on summary conviction before a justice, sheriff, or magistrate, shall be liable to be imprisoned for any term not exceeding six months, with or without hard labour. Section 9 enacts that nothing in this Act shall prevent any person from being proceeded against and punished under any other Act or at common law in respect of an offence (if any) punishable as well under this Act as under any other Act or at common law.

Miscellaneous Offences.

Perjury.

It is enacted by the Naval Discipline Act, s. 67, that every person who upon any examination upon oath, or upon affirmation before any court-martial held in pursuance of this Act, shall wilfully and corruptly give false evidence, shall be liable to the penalties of wilful and corrupt perjury.

The oath or affirmation must be material to the matter then under consideration of the court.

It is necessary to prove in substance the whole of what is set out in the indictment as having been sworn by the defendant, and of the evidence connected with it and necessary to explain it; proving a part only, it seems, is not sufficient.[2] And it must be proved literally or

[1] See provisions of the Penal Servitude Act, 1891, *post*, p. 242.

[2] *R.* v. *Jones* (1791), Peake, 3rd ed., 51; *R.* v. *Dowlin* (1793), 5 T. R. 317.

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substantially as set out.[1] And the evidence must be clear and precise, and not ambiguous.[2]

It does not matter whether the false evidence is given orally or on affidavit, nor whether the evidence was given for the Crown or for the defence in a criminal case. Nor does it matter whether the false oath was believed or not, nor whether it caused any injury to the person against whom it was given; for the gist of the offence at common law is the abuse of public justice and not the injury to an individual.

The matter sworn must be either false in fact, or if true the defendant must not have known it, or not have believed it, to be so. Where a man swears to a particular fact, without knowing at the time whether the fact is true or false, it is as much perjury as if he knew the fact to be false, and a man may be indicted for perjury in swearing that he believes a fact to be true which he must know to be false.

The false oath must be taken deliberately and intentionally; for if taken from inadvertence or mistaken it cannot amount to wilful and corrupt perjury. Perjury is always charged as having been committed "corruptly" as well as "wilfully." The word "corruptly," even if it is not essential at common law, is inserted in indictments to justify the statutory punishments provided for wilful and corrupt perjury.[3]

Evidence.

To support the charge, the matter sworn to must be proved by evidence. If in writing, it must be produced. Thus, it would be necessary in proceedings under the above section to produce that part of the original minutes of the court-martial which contained the matter sworn.

Where the defendant on arraignment pleads guilty to the perjury charged, or where he has made a confession

[1] *R.* v. *Leefe* (1809), 2 Camp. 134.
[2] *R.* v. *Bird* (1891), 17 Cox, 387.
[3] Arch., 24th ed., 1162; 1 Russ., 7th ed., 477.

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or admission, that his previous statement on oath was false, corroboration is not necessary to warrant his conviction and sentence. But in all other cases the evidence of one witness is not sufficient to convict the defendant on an indictment for perjury. The rule does not extend to all the facts which are necessary to be proved on the trial of an indictment for perjury; but only to the proof of the falsity of the matter upon which the perjury is assigned.

Subornation of perjury.

Subornation of perjury is a misdemeanor indictable at common law and is punishable in the same manner as perjury. It consists in procuring to take a false oath amounting to perjury a man who actually takes such oath.[1]

Punishment.

The punishment by statute for wilful and corrupt perjury is penal servitude for not more than seven nor less than three years, or imprisonment with or without hard labour for not more than two years.[2]

Children of tender years are under certain circumstances allowed to give evidence without being sworn, but in such a case they are liable to be punished for perjury on summary conviction if they give false evidence.[3]

Foreign Enlistment Act, 1870.

Every person is guilty of a misdemeanor and is liable upon conviction thereof to fine and imprisonment with or without hard labour, or either of such punishments, who does any of the following acts without the licence of his Majesty under his sign manual. or signified by Order in Council, or by proclamation,[4] that is to say:

(1) who, being a British subject, within or without

[1] 1 Hawk. c. 69, s. 10.

[2] 2 Geo. 2, c. 25, s. 2; 20 & 21 Vict. c. 3, s. 2; 54 & 55 Vict. c. 69, s. 1. See *R.* v. *Castro* (1880), 5 Q. B. D. 490; *Castro* v. *R.* (1881), 6 App. Cas. 229.

[3] 4 Edw. 7, c. 15, s. 15; 8 Edw. 7, c. 67, s.

[4] 33 & 34 Vict. c. 90, s. 15.

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his Majesty's dominions, accepts or agrees to accept any commission or engagement in the military or naval service of any foreign State at war with any friendly State;[1] or

(2) who, whether a British subject or not, within his Majesty's dominions, induces any other person to accept or agree to accept any commission or engagement in the military or naval service of any such foreign State;[2] or

(3) who, being a British subject, quits or goes on board any ship with a view of quitting his Majesty's dominions, with intent to accept any commission or engagement in the military or naval service of any foreign State at war with a friendly State; or

(4) who, whether a British subject or not, within his Majesty's dominions, induces any other person to quit or go on board any ship with a view of quitting his Majesty's dominions with the like intent;[3] or

(5) who induces any other person to quit his Majesty's dominions or to embark on any ship within his Majesty's dominions under a misrepresentation or false representation of the service in which such person is to be engaged, with the intent or in order that such person may accept or agree to accept any commission or engagement in the military or naval service of any foreign State at war with a friendly State;[4]

(6) who, being the master or owner of any ship, knowingly either takes on board, or engages to take on board or has on board such ship within his Majesty's dominions, any illegally enlisted person, that is to say, who, being a British subject, without his Majesty's licence (i.) has accepted or agreed to accept any commission or engagement in the military or naval service

[1] 33 & 34 Vict. c. 90, s. 4. "Friendly State" means "any foreign State at peace with his Majesty."
[2] Ibid.
[3] Ibid. s. 5.
[4] Ibid. s. 6.

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of any foreign State at war with any friendly State[1]; (ii.) or is about to quit his Majesty's dominions with intent to accept any commission or engagement in the military or naval service of any foreign State at war with a friendly State; or (iii.) any person who has been induced to embark under a misrepresentation or false representation of the service in which such person is to be engaged, with the intent or in order that such person may accept or agree to accept any commission or engagement in the military or naval service of any foreign State at war with a friendly State.

Every ship referred to in this section is to be detained until the trial and conviction or acquittal of the master or owner, and until all penalties inflicted on the master or owner have been paid, or the master or owner has given security for the payment of such penalties to the satisfaction of two justices of the peace, or other magistrate having the authority of two justices; and all illegally enlisted persons must, immediately on discovery of the offence, be taken on shore, and must not be allowed to return.[2]

(7) who, within his Majesty's dominions, with intent or knowledge, or having reasonable cause to believe, that the same will be employed in the military or naval service of any foreign State at war with any friendly State, builds, agrees to build, causes to be built, equips, despatches, or causes or allows to be despatched, any ship, or issues or delivers any commission for any ship. The ship in respect of which any such offence is committed, and her equipment, shall be forfeited to his Majesty.[3] But a person building or equipping a ship in pursuance of a contract made before the commencement of the war is not liable to the penalties imposed

[1] See note (1), p. 213, *ante*.
[2] 33 & 34 Vict. c. 90, s. 7.
[3] Ibid. s. 8; see *R.* v. *Sandoval* (1887), 3 T. L. R. 411; *Att.-Gen.* v. *Sillem* (1863), 2 H. & C. 431.

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for building or equipping, if forthwith upon his Majesty's proclamation of neutrality such person gives notice to the Secretary of State that he is building or equipping the ship, and gives him such particulars of the contract as he may require, and gives such security and permits such other measures to be taken as the Secretary of State may prescribe for ensuring that the ship shall not be removed without his Majesty's licence until the termination of the war.[1] Like penalties are attached to the offences of aiding the warlike equipment of foreign ships, and fitting out naval or military expeditions.[2]

Official Secrets Act, 1911.[3]

Penalties for spying

Every one is guilty of felony, and is liable on conviction to penal servitude for seven years, who for any purpose prejudicial to the safety or interests of the State does any of the following things (that is to say): (*a*) approaches or is in the neighbourhood of, or enters any prohibited place;[4] or (*b*) makes any sketch,[4] plan, model,[5] or note which is calculated to be, or might be, or is intended to be directly or indirectly useful to an enemy; or (*c*) obtains or communicates to any other person any sketch, plan, model, article or note or other document,[4] or information which is calculated to be, or might be, or is intended to be directly or indirectly useful to an enemy. On a prosecution under this section, it is not necessary to show that the accused person was guilty of any particular act tending to show a purpose prejudicial to the safety or interests of the State, and, notwithstanding that no such act is proved against him, he may be convicted if, from the circumstances of the case, or his conduct, or his known character as proved, it appears that his purpose was a purpose prejudicial to the safety or interests of the State; and if any sketch,

[1] 33 & 34 Vict. c. 90, s. 8.
[2] Ibid. ss. 10, 11.
[3] 1 & 2 Geo. 5, c. 28.
[4] See sec. 3, *post*.
[5] See sec. 12.

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plan, model, article, note, document, or information relating to or used in any prohibited place, or anything in such place, is made, obtained, or communicated by any person other than a person acting under lawful authority, it is to be deemed to have been made, obtained, or communicated for purposes prejudicial to the safety or interests of the State unless the contrary is proved.[1]

Penalty for harbouring spies.

Every one is guilty of a misdemeanor, and is liable on conviction thereof to imprisonment for one year, with or without hard labour, or to a fine, or both, who knowingly harbours any person whom he knows, or has reasonable grounds for supposing, to be a person who is about to commit or who has committed an offence under this Act, or knowingly permits to meet or assemble in any premises in his occupation or under his control any such persons, or if any person having harboured any such person, or permitted to meet or assemble in any premises in his occupation or under his control any such persons, wilfully refuses to disclose to a superintendent of police any information which it is in his power to give in relation to any such person.[2]

Wrongful communication, &c., of information.

Every one is guilty of a misdemeanor, and is liable on conviction thereof to imprisonment for two years, with or without hard labour, or to a fine, or both, who does any of the following things (that is to say): (1) who having in his possession or control any sketch, plan, model, article, note, document, or information which relates to or is used in a prohibited place or anything in such a place, or which has been made or obtained in contravention of this Act, or which has been entrusted in confidence to him by any person holding office under his Majesty or which he has obtained owing to his position as a person who holds or has held office under his Majesty, or as a

[1] 1 & 2 Geo. 5, c. 28, s. 1.
[2] Ibid. s. 7.

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person who holds or has held a contract made on behalf of his Majesty, or as a person who is or has been employed under a person who holds or has held such an office or contract,—

a. communicates the sketch, plan, model, article, note, document, or information to any person, other than a person to whom he is authorized to communicate it, or a person to whom it is in the interest of the State his duty to communicate it, or

b. retains the sketch, plan, model, article, note, or document in his possession or control when he has no right to retain it or when it is contrary to his duty to retain it.[1]

(2) who receives any sketch, plan, model, article, note, document, or information, knowing, or having reasonable ground to believe, at the time when he receives it, that the sketch, plan, model, article, note, document, or information is communicated to him in contravention of this Act, unless he proves that the communication to him of the sketch, plan, model, article, note, document, or information was contrary to his desire.[2]

Definition of prohibited place.

For the purposes of the Official Secrets Act, 1911, the expression "prohibited place" means:

a. any work of defence, arsenal, factory, dockyard, camp, ship, telegraph or signal station, or office belonging to his Majesty, and any other place belonging to his Majesty used for the purpose of building, repairing, making, or storing any ship, arms, or other materials or instruments of use in time of war, or any plans or documents relating thereto; and

b. any place not belonging to his Majesty where any ship, arms, or other materials or instruments of use in time of war, or any plans or documents relating

[1] 1 & 2 Geo. 5, c. 28, s. 2 (1).
[2] Ibid. s. 2 (2).

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thereto, are being made, repaired, or stored under contract with, or with any person on behalf of, his Majesty, or otherwise on behalf of his Majesty; and

c. any place belonging to his Majesty which is for the time being declared by a Secretary of State to be a prohibited place for the purposes of this section on the ground that information with respect thereto, or damage thereto, would be useful to an enemy; and

d. any railway, road, way, or channel, or other means of communication by land or water (including any works or structures being part thereof or connected therewith), or any place used for gas, water, or electricity works or other works for purposes of a public character, or any place where any ship, arms, or other materials or instruments of use in time of war, or any plans or documents relating thereto, are being made, repaired, or stored otherwise than on behalf of his Majesty, which is for the time being declared by a Secretary of State to be a prohibited place for the purposes of this section, on the ground that information with respect thereto, or the destruction or obstruction thereof, or interference therewith, would be useful to an enemy.[1]

Attempts to commit offence, or incitement to commit offence under the Act.

Any person who attempts to commit any offence under this Act, or incites, or counsels, or attempts to procure another person to commit an offence under this Act, shall be guilty of felony or of a misdemeanor, according as the offence in question is felony or misdemeanor, and on conviction shall be liable to the same punishment, and to be proceeded against in the same manner, as if he had committed the offence.[2]

Person charged with felony under the Act may be convicted of

Any person charged with an offence which is a felony under this Act may, if the circumstances warrant such

[1] 1 & 2 Geo. 5, c. 28, s. 3.
[2] Ibid. s. 4.

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a finding, be found guilty of an offence which is a misdemeanor under this Act.[1] misdemeanor.

Any person who is found committing an offence under this Act, whether that offence is a felony or not, or who is reasonably suspected of having committed, or having attempted to commit, or being about to commit, such an offence, may be apprehended and detained in the same manner as a person who is found committing a felony.[2] Power to arrest.

If a justice of the peace is satisfied by information on oath that there is reasonable ground for suspecting that an offence under this Act has been or is about to be committed, he may grant a search warrant authorizing any constable named therein to enter at any time any premises or place named in the warrant, if necessary, by force, and to search the premises or place and every person found therein, and to seize any sketch, plan, model, article, note, or document, or anything of a like nature or anything which is evidence of an offence under this Act having been or being about to be committed, which he may find on the premises or place or on any such person, and with regard to or in connection with which he has reasonable ground for suspecting that an offence under this Act has been or is about to be committed.[3] Search warrants.

Where it appears to a superintendent of police that the case is one of great emergency and that in the interest of the State immediate action is necessary, he may by a written order under his hand give to any constable the like authority as may be given by the warrant of a justice under this section.[4]

A prosecution for an offence under this Act is not to Restriction on prosecution.

[1] 1 & 2 Geo. 5, c. 28, s. 5.
[2] Ibid. s. 6.
[3] Ibid. s. 9 (1).
[4] Ibid. s. 9 (2).

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be instituted except by or with the consent of the Attorney-General:

Provided that a person charged with such an offence may be arrested, or a warrant for his arrest may be issued and executed, and any such person may be remanded in custody or on bail, notwithstanding that the consent of the Attorney-General to the institution of a prosecution for the offence has not been obtained, but no further or other proceedings are to be taken until that consent has been obtained.[1]

Extent of the Act and place of trial.

This Act applies to all acts which are offences under this Act when committed in any part of his Majesty's dominions, or when committed by British officers or subjects elsewhere. An offence under this Act, if alleged to have been committed out of the United Kingdom, may be inquired of, heard, and determined, in any competent British court in the place where the offence was committed, or in the High Court in England or the Central Criminal Court. An offence under this Act is not to be tried by any court of general or quarter sessions, nor by the sheriff court in Scotland, nor by any court out of the United Kingdom which has not jurisdiction to try crimes which involve the greatest punishment allowed by law.[2]

Saving for laws of British possessions.

If by any law made before or after the passing of this Act by the legislature of any British possession provisions are made which appear to his Majesty to be of the like effect as those contained in this Act, his Majesty may, by Order in Council, suspend the operation within that British possession of this Act, or of any part thereof, so long as that law continues in force there, and no longer, and the Order shall have effect as if it were enacted in this Act: Provided that the suspension of this Act, or of any part thereof, in any British possession is not

[1] 1 & 2 Geo. 5, c. 28, s. 8.
[2] Ibid. s. 10.

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extended to the holder of an office under his Majesty who is not appointed to that office by the Government of that possession.[1]

Interpretation of terms used.

In this Act, unless the context otherwise requires—

Any reference to a place belonging to his Majesty includes a place belonging to any department of the Government of the United Kingdom or of any British possessions, whether the place is or is not actually vested in his Majesty;

The expression "Attorney-General" means the Attorney- or Solicitor-General for England; and as respects Scotland, means the Lord Advocate; and as respects Ireland, means the Attorney- or Solicitor-General for Ireland; and, if the prosecution is instituted in any court out of the United Kingdom, means the person who in that court is Attorney-General, or exercises the like functions as the Attorney-General in England;

Expressions referring to communicating or receiving include any communicating or receiving, whether in whole or in part, and whether the sketch, plan, model, article, note, document, or information itself or the substance, effect, or description thereof only be communicated or received; expressions referring to obtaining or retaining any sketch, plan, model, article, note, or document, include the copying or causing to be copied the whole or any part of any sketch, plan, model, article, note, or document; and expressions referring to the communication of any sketch, plan, model, article, note, or document include the transfer or transmission of the sketch, plan, model, article, note, or document;

The expression "document" includes part of a document;

The expression "model" includes design, pattern, and specimen;

[1] 1 & 2 Geo. 5, c. 28, s. 11.

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The expression "sketch" includes any photograph or other mode of representing any place or thing;

The expression "superintendent of police" includes any police officer of a like or superior rank;

The expression "office under his Majesty" includes any office or employment in or under any department of the Government of the United Kingdom, or of any British possession;

The expression "offence under this Act" includes any act, omission, or other thing which is punishable under this Act.[1]

[1] 1 & 2 Geo. 5, c. 28, s. 12.

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TABLE OF PRINCIPAL OFFENCES,

Their Punishments, Statutes, &c.

Note.—The maximum length of penal servitude is stated. The minimum is in every case *three* years, or alternatively a maximum of *two* years imprisonment with or without hard labour, see 54 & 55 Vict. c. 69, s. 1.

Description of Offence.	Felony or Misdemeanor.	Statutes, &c., by which it is created.	Maximum Punishment.
Abduction:			
With intent to marry	F.	24 & 25 Vict. c. 100, s. 53	P. S. for 14 years
Of any woman under 21	F.	*Ibid.*, s. 54	*Ibid.*
Of girls under 16	M.	*Ibid.*, s. 55	Impt. with hard labour for 2 years
Of girls under 18	M.	48 & 49 Vict. c. 69, s. 7	*Ibid.*
Abortion:			
Committing or procuring	F.	24 & 25 Vict. c. 100, s. 58	P. S. for life
Supplying poison or instruments for	M.	*Ibid.*, s. 59	P. S. for 5 years
Accessory:			
Before the fact	F.	24 & 25 Vict. c. 94, s. 1	Same penalty as may be awarded for the offence
After the fact (if offence is a felony)	F.	*Ibid.*, s. 4	Impt. for 2 years with or without hard labour, or, if the offence is murder, P. S. for life

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TABLE OF PRINCIPAL OFFENCES—*continued.*

Description of Offence.	Felony or Misdemeanor.	Statutes, &c., by which it is created.	Maximum Punishment.
Accusing of Crime:			
By letter or otherwise, with intent to extort.	F.	24 & 25 Vict. c. 96, ss. 46, 47 .	P. S. for life
With intent to compel execution of a valuable security.	F.	*Ibid.*, s. 48	*Ibid.*
Arson:			
In cases of certain specified buildings, as place of worship, dwelling-house, any person being therein, house, farm, building, &c., with intent to injure or defraud, any public building.	F.	24 & 25 Vict. c. 97, ss. 1—5 .	*Ibid.*
In cases of other buildings . . .	F.	*Ibid.*, s. 6	P. S. for 14 years
Setting fire to things in, &c., buildings, &c.	F.	*Ibid.*, s. 7	*Ibid.*
Attempt to set fire to buildings . .	F.	*Ibid.*, s. 8	*Ibid.*
Setting fire to crops, trees, &c. . .	F.	*Ibid.*, s. 16	*Ibid.*
,, ,, ,, stacks of corn, &c. . .	F.	*Ibid.*, s. 17	P. S. for life
Attempt to set fire to crops, &c., stacks .	F.	*Ibid.*, s. 18	P. S. for 7 years
Setting fire to mines of coal, &c. . .	F.	*Ibid.*, s. 26	P. S. for life
Attempting the same	F.	*Ibid.*, s. 27	P. S. for 14 years
Setting fire to, or casting away ships .	F.	*Ibid.*, ss. 42, 43 . . .	P. S. for life
Attempting the same	F.	*Ibid.*, s. 44	P. S. for 14 years
Setting fire to ships of war or military stores.	F.	12 Geo. 3, c. 24, s. 1 . .	Death

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,, ,, vessels in dock of London.	F.	39 Geo. III, c. 69, s. 104 . .	*Ibid.*
Letter threatening to commit arson .	F.	24 & 25 Vict. c. 97, s. 50 . .	P. S. for 10 years
Assaults:			
Common assault	M.	24 & 25 Vict. c. 100, ss. 42, 47	1 year's Impt.
Actual bodily harm	M.	*Ibid.*, s. 47	P. S. for 5 years
Grievous bodily harm	M.	*Ibid.*, s. 20	*Ibid.*
Grievous bodily harm with intent to maim, resist apprehension, &c.	F.	*Ibid.*, s. 18	P. S. for life
Assault with intent to commit felony .	M.	*Ibid.*, s. 38	2 years' Impt.
Attempt to choke, &c., with intent, &c. .	F.	*Ibid.*, s. 21; 26 & 27 Vict. c. 44	P. S. for life
Administering chloroform, &c., with intent, &c.	F.	24 & 25 Vict. c. 100, s. 22 .	*Ibid.*
Administering poison, so as to endanger, &c.	F.	*Ibid.*, ss. 23, 25 . . .	P. S. for 10 years
Administering poison, with intent to annoy, &c.	M.	*Ibid.*, ss. 24, 25 . . .	P. S. for 5 years
By explosion, &c., doing grievous bodily harm.	F.	*Ibid.*, s. 28	P. S. for life
Causing explosion with intent to do grievous bodily harm.	F.	*Ibid.*, s. 29	*Ibid.*
Placing gunpowder, &c., near buildings, ships, &c., with intent.	F.	*Ibid.*, s. 30	P. S. for 14 years
Endangering safety of railway passengers by certain acts.	F.	*Ibid.*, ss. 32, 33 . . .	P. S. for life
Endangering safety of railway passengers otherwise.	M.	*Ibid.*, s. 34	2 years' Impt.
Assault on officer, &c., preserving wreck	M.	*Ibid.*, s. 37	P. S. for 7 years
Impeding escape from wreck . .	F.	*Ibid.*, s. 17	P. S. for life

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TABLE OF PRINCIPAL OFFENCES—*continued.*

Description of Offence.	Felony or Misdemeanour.	Statutes, &c., by which it is created.	Maximum Punishment.
Assaults—*continued.*			
With intent to rob	F.	24 & 25 Vict. c. 96. s. 42 .	P. S. for 5 years
Any person committing an indictable offence by night, assaulting any person authorized to arrest.	M.	14 & 15 Vict. c. 19, s. 12 .	Impt. with hard labour for 3 years
Indecent assault on a male person .	M.	24 & 25 Vict. c. 100, s. 62 .	P. S. for 10 years
With intent to commit sodomy . .	M.	*Ibid.*	*Ibid.*
Attempts:			
To commit murder	F.	*Ibid.*, ss. 11—15 . . .	P. S. for life
,, sodomy	M.	*Ibid.*, s. 62	P. S. for 10 years
,, crimes generally . . .	M.	Common law	Impt., or fine, or both
,, felony	M.	3 Geo. IV., c. 114 . . .	Impt. with hard labour
Administering drugs with intent to commit an indictable offence.	F.	24 & 25 Vict. c. 100, s. 22 .	P. S. for life
To have carnal knowledge of a girl under 13.	M.	48 & 49 Vict. c. 69, s. 4 . .	Impt. with hard labour for 2 years
To have carnal knowledge of a girl over 13 and under 16.	M.	*Ibid.*, s. 5	*Ibid.*

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Burglary. *See* **Housebreaking.**	F.	24 & 25 Vict. c. 96, ss. 50—52 .	P. S. for life
Cheating:			
Cheating	M.	Common Law . . .	Fine or Impt. or both
At cards, &c.	M.	8 & 9 Vict. c. 109, s. 17 . .	P. S. for 5 years
Coinage:			
Counterfeiting, or washing, colouring, &c., in imitation of gold or silver coin	F.	24 & 25 Vict. c. 99, ss. 2, 3 .	P. S. for life
Lightening gold or silver coin . .	F.	*Ibid.*, s. 4	P. S. for 14 years
Having possession of filings, &c., produced by lightening gold or silver coin.	F.	*Ibid.*, s. 5	P. S. for 7 years
Buying, selling, &c., counterfeit gold or silver coin at a lower rate than its denomination imports.	F.	*Ibid.*, s. 6	P. S. for life
Importing counterfeit gold or silver coin	F.	*Ibid.*, s. 7	*Ibid.*
Uttering counterfeit gold or silver coin .	M.	*Ibid.*, s. 9	Impt. with hard labour for 1 year
Uttering counterfeit gold or silver coin, having other counterfeit coin, or within ten days tendering like counterfeit coin	M.	*Ibid.*, s. 10	Impt. with hard labour for 2 years
Possessing three counterfeit coins with intent to utter.	M.	*Ibid.*, s. 11	P. S. for 5 years
Committing any of the last three offences after conviction against the Coining Act	F.	*Ibid.*, s. 12	P. S. for life
Tendering foreign gold or silver coin, &c., as current.	M.	*Ibid.*, s. 13	Impt. with hard labour for 1 year

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TABLE OF PRINCIPAL OFFENCES—*continued.*

Description of Offence.	Felony or Misdemeanor.	Statutes, &c., by which it is created.	Maximum Punishment.
Coinage—*continued.*			
Making, or possessing tools for making, or buying, &c., counterfeit copper coin	F.	24 & 25 Vict. c. 99, s. 14 . .	P. S. for life
Uttering counterfeit copper coin or possessing three pieces with intent to utter.	M.	*Ibid.*, s. 15	Impt. with hard labour for 1 year
Counterfeiting or importing gold or silver foreign coin.	F.	*Ibid.*, ss. 18, 19 . . .	P. S. for 7 years
Tendering such coin	M.	*Ibid.*, ss. 20, 21 . . .	Impt. with hard labour for 6 months; second offence, 2 years; third offence (F.), P. S. for life
Counterfeiting foreign coins of less value than silver.	M.	*Ibid.*, s. 22	Impt. with hard labour for 1 year; second offence, P. S. for 7 years
Exporting counterfeit coin . . .	M.	*Ibid.*, s. 8	Impt. with hard labour for 2 years
Defacing coin	M.	*Ibid.*, s. 16	Impt. with hard labour for 1 year
Making, buying, selling, &c., coining tools	F.	*Ibid.*, s. 24	P. S. for life

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Principal in the second degree and accessory before the fact in or to any felony under the Act.	F.	*Ibid.*, s. 35	As principal
Accessory after the fact to any felony under the Act.	M.	*Ibid.*	Impt. with hard labour for 1 year
Selling medals resembling coins . .	M.	46 & 47 Vict. c. 45, s. 2 . .	*Ibid.*
Conspiracy:			
To commit a crime	M.	Common Law . . .	Fine, or Imprisonment, or both
Seditious conspiracy	M.	*Ibid.*	*Ibid.*
To prevent or defeat the course of justice, or extort money, or falsely accuse of a crime.	M.	*Ibid.*, and 14 & 15 Vict. c. 100, s. 29.	Impt. with hard labour for 1 year
Being a member of an unlawful conspiracy	M.	39 Geo. III., c. 79, s. 2; 57 Geo. III., c. 19, s. 25.	P. S. for 7 years
Conversion:			
By trustee, bailee, &c.	M.	1 Edw. VII., c. 10 . . .	*Ibid.*
Disguise at Night:			
Being disguised at night with intention of committing a felony.	M. first offence; F. second offence.	24 & 25 Vict. c. 99, ss. 58, 59 .	P. S. for 5 years for first offence P. S. for 10 years for second offence
Drivers of Carriages:			
Causing bodily harm	M.	24 & 25 Vict. c. 100, s. 35 .	Impt. with hard labour for 2 years

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TABLE OF PRINCIPAL OFFENCES—*continued.*

Description of Offence	Felony or Misdemeanor.	Statutes, &c., by which it is created.	Maximum Punishment.
Embezzlement:			
Fraudulently converting chattels, &c., of which person has control by virtue of appointment in public service.	F.	24 & 25 Vict. c. 96, s. 68 .	P. S. for 14 years
	F.	*Ibid.*, ss. 69, 70 . . .	*Ibid.*
Escapes:			
Aiding	F.	16 Geo. II., c. 31 . . .	Impt. for 2 years
Aiding while prisoner being conveyed to prison.	F.	28 & 29 Vict. c. 126, s. 37 .	P. S. for 7 years
Aiding prisoner of war . . .	F.	52 Geo. III., c. 156 . .	P. S. for life
Breach of prison, if for felony . .	F.	1 Edw. II., stat. 2, c. 1 . .	P. S. for 7 years
„ „ otherwise . . .	M.	16 Geo. II., c. 31 . . .	Fine and Imprisonment
Being at large during a term of penal servitude.	F.	5 Geo. IV., c. 84, s. 22; 4 & 5 Will. IV., c. 67.	P. S. for life
Rescue, if person rescued convicted of felony.	F.	1 & 2 Geo. IV., c. 88 . .	P. S. for 7 years
Rescue if not so convicted, or of misdemeanor.	M.	Common Law . . .	Fine, or Imprisonment, or both
Rescue in case of murder . . .	F.	25 Geo. II., c. 37, s. 9 . .	P. S. for life
Explosives:			
Causing grievous bodily harm by explosion.	F.	24 & 25 Vict. c. 100, s. 28 .	*Ibid.*

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Causing explosion, or sending or throwing corrosive fluid or explosive with intent to do grievous bodily harm.	F.	*Ibid.*, s. 29	*Ibid.*
Placing explosive near a building with intent to do any bodily injury.	F.	*Ibid.*, s. 30	P. S. for 14 years
Making or causing explosions, unlawful possession of explosives, &c.	F.	46 Vict. c. 3	P. S. for life, 20, 14 years
False Pretences:			
Obtaining chattels or the delivery thereof by.	M.	24 & 25 Vict. c. 96, ss. 88, 89 .	P. S. for 5 years
Inducing to execute a valuable security by	M.	*Ibid.*, s. 90	*Ibid.*
Falsification of Accounts:	M.	38 & 39 Vict. c. 24, s. 1 . .	P. S. for 7 years
Forgery:			
Of H.M. seals	F.	24 & 25 Vict. c. 98, s. 1 . .	P. S. for life
Of banknotes	F.	*Ibid.*, s. 12	*Ibid.*
Deeds, wills, requests, &c.	F.	*Ibid.*, ss. 20—23 . . .	*Ibid.*
Making or accepting bill without authority	F.	*Ibid.*, s. 24	P. S. for 14 years
Of proceedings of a court, process or instrument made evidence.	F.	*Ibid.*, ss. 27—29 . . .	P. S. for 7 years
Of name of Accountant-General, &c. .	F.	*Ibid.*, s. 33	P. S. for 14 years
Of a marriage licence	F.	*Ibid.*, s. 35	P. S. for 7 years
Demanding or receiving property on forged instruments.	F.	*Ibid.*, s. 38	P. S. for 14 years
Accessories after the fact in felonious forgeries.	F.	*Ibid.*, s. 49	Impt. with hard labour for 2 years
Of quarantine certificates	F.	6 Geo. IV., c. 78, s. 28 . .	P. S. for 7 years
Of statutory evidence, as judge's signature, and Act of Parliament, &c.	F.	8 & 9 Vict. c. 113, s. 4 . .	*Ibid.*

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TABLE OF PRINCIPAL OFFENCES—*continued.*

Description of Offence.	Felony or Misdemeanor.	Statutes, &c., by which it is created.	Maximum Punishment.
Forgery—*continued.*			
Of proclamations, &c.	F.	31 & 32 Vict. c. 37, s. 4 . .	P. S. for 5 years
At common law (*see* p. 204) . . .	M.	Common Law . . .	Fine, or Imprisonment, or both
Fraudulent Trustees:	M.	24 & 25 Vict. c. 96, ss. 76—84 .	P. S. for 7 years
Housebreaking. *See* **Burglary and Larceny.**			
Entering a house at night to commit a felony.	F.	*Ibid.*, s. 54	*Ibid.*
Breaking and entering a building within the curtilage of a dwelling-house, or a dwelling-house, shop, &c., and committing a felony, or committing a felony and breaking out.	F.	*Ibid.*, ss. 55, 56 . . .	P. S. for 14 years
Breaking and entering a dwelling-house with intent to commit a felony.	F.	*Ibid.*, s. 57	P. S. for 7 years
Being found by night armed with intent to break into a building and commit a felony or having an implement of housebreaking without excuse, or with faces blackened, or in a building with intent to commit any felony thereon.	M.	*Ibid.*, s. 58	P. S. for 5 years

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Incitement to Commit a Crime:	M.	Common Law . . .	Impt. for 2 years, or fine, or both
Indecency:			
In public	M.	—	Impt. with hard labour, or fine, or both
Committing gross act of—between males	M.	48 & 49 Vict. c. 69, s. 11 .	Impt. with hard labour for 2 years
Indecent Assault on Female:	M.	24 & 25 Vict. c. 100, s. 52 .	*Ibid.*
Larceny. See *Robbery.*			
Generally	F.	24 & 25 Vict. c. 96, s. 4 . .	P. S. for 5 years; after conviction for felony, 10 years P. S.
Of valuable security	F.	*Ibid.*, s. 27	P. S. for 5 years
Of a will, or destroying it, &c. . .	F.	*Ibid.*, s. 29	P. S. for life
Of a record of a court or public office .	F.	*Ibid.*, s. 30	P. S. for 5 years
From the person	F.	*Ibid.*, s. 40	P. S. for 14 years
By menaces and threats . . .	F.	*Ibid.*, s. 45	P. S. for 5 years
In a dwelling-house to the value of £5, or causing bodily fear.	F.	*Ibid.*, ss. 60, 61 . . .	P. S. for 14 years
Of goods in a vessel, on a wharf, &c. .	F.	*Ibid.*, s. 63	*Ibid.*
Of part of or the goods in a vessel in distress.	F.	*Ibid.*, s. 64	*Ibid.*
Letter:			
Threatening to kill	F.	24 & 25 Vict. c. 100, s. 16 .	P. S. for 10 years
,, to burn	F.	24 & 25 Vict. c. 97, s. 50 .	*Ibid.*
,, to accuse of crime . .	F.	24 & 25 Vict. c. 96, s. 46 .	P. S. for life

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TABLE OF PRINCIPAL OFFENCES—*continued.*

Description of Offence.	Felony or Misdemeanor.	Statutes, &c., by which it is created.	Maximum Punishment.
Letter—*continued.*			
Demanding money with menaces	F.	24 & 25 Vict. c. 96, s. 44	P. S. for life
Sending indecent	M.	47 & 48 Vict. c. 76, s. 4	Impt. with hard labour for 1 year
Malicious Injuries:			
To sea and river banks	F.	24 & 25 Vict. c. 97, s. 30	P. S. for life.
To materials for securing the same	F.	*Ibid.*, s. 31	P. S. for 7 years
To bridges and viaducts	F.	*Ibid.*, s. 33	P. S. for life
To ships otherwise than by fire, explosives, &c. See *Arson.*	F.	*Ibid.*, s. 46	P. S. for 14 years
Altering lights and signals	F.	*Ibid.*, s. 47	P. S. for life
To buoys, &c.	F.	*Ibid.*, s. 48	P. S. for 7 years
To ship in distress	F.	*Ibid.*, s. 49	P. S. for 14 years
To other property when exceeding £5	M.	*Ibid.*, s. 51	Impt. with hard labour for 2 years
The like between 9 p.m. and 6 a.m.	M.	*Ibid.*	P. S. for 5 years
Marriage:			
Improperly solemnising, of member of the Royal Family.	M.	12 Geo. III., c. 11	Impt. with hard labour for 2 years, or fine
Solemnising in an unlawful place or without due notice, &c.	F.	6 & 7 Will. IV., c. 85, s. 39	P. S. for 7 years

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Manslaughter:	F.	Common Law . . .	P. S. for life, or fine, or both; 24 & 25 Vict. c. 100, s. 5
Murder:	F.	*Ibid.*	Death
Accessory to, after the fact . . .	F.	24 & 25 Vict. c. 100, s. 67 .	P. S. for life
Conspiracy to	M.	*Ibid.*, s. 4	P. S. for 10 years
Signing false certificate of death of person hanged for.	M.	31 Vict. c. 24, s. 9 . . .	Impt. with hard labour for 2 years
Official Secrets:			
Penalties for spying	F.	1 & 2 Geo. V., c. 28, s. 1 . .	P. S. for 7 years
Harbouring spies	M.	*Ibid.*, s. 7	Impt. for 1 year with hard labour, or fine, or both
Wrongful communication of information	M.	*Ibid.*, s. 2	Impt. for 2 years with hard labour, or fine, or both
Attempt to commit offence or incitement	F. or M.	*Ibid.*, s. 4	Same punishment as if offence committed
Perjury:	M.	Common Law . . .	P. S. for 7 years
Subornation of	M.	*Ibid.*	*Ibid.*
False swearing	M.	*Ibid.*	Impt. with hard labour for 2 years, or fine
Forging certain instruments of proof .	F.	8 & 9 Vict. c. 113, s. 4; 52 Vict. c. 10, s. 8.	P. S. for 7 years
Giving certain false certificates . .	M.	14 & 15 Vict. c. 99, s. 15 . .	Impt. for 18 months

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TABLE OF PRINCIPAL OFFENCES—*continued.*

Description of Offence.	Felony or Misdemeanor.	Statutes, &c., by which it is created.	Maximum Punishment.
Personation:			
Of soldiers for their prize money	F.	2 Will. IV., c. 53, s. 19; 7 Geo. IV., c. 16, s. 38.	P. S. for life
In respect of execution of a legal document	F.	24 & 25 Vict. c. 98, s. 34	P. S. for 7 years
With intent to obtain property	F.	37 & 38 Vict. c. 36, s. 1	P. S. for life
Piracy:			
Assault with intent to commit	F.	7 Will. IV. and 1 Vict. c. 88, s. 2	Death
Acting with the King's enemies	F.	18 Geo. II., c. 30	P. S. for life
Boarding and throwing cargo overboard	F.	8 Geo. I., c. 24, s. 1	*Ibid.*
Favouring pirates	F.	11 & 12 Will. III., c. 7, s. 8	*Ibid.*
Trading with pirates	F.	8 Geo. I., c. 24, s. 1	*Ibid.*
Not fighting pirates	M.	*Ibid.*, s. 6	Impt. for 6 months
Piratical slave trading	F.	5 Geo. IV., c. 113, s. 9	P. S. for life
Poison:			
Administering so as to inflict grievous bodily harm.	F.	24 & 25 Vict. c. 100, s. 23	P. S. for 10 years
Administering with intent to injure	M.	*Ibid.*, s. 4	P. S. for 5 years
Post Office:			
Person employed stealing a post letter	F.	7 Will. IV. and 1 Vict. c. 36, s. 26	P. S. for 7 years
The like if the letter contains money	F.	*Ibid.*	P. S. for life
Stealing from a letter	F.	*Ibid.*, s. 27	*Ibid.*

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Stealing from a letter bag or from a post office, &c.	F.	*Ibid.*, s. 28	*Ibid.*
Taking a letter from or opening a letter bag	F.	*Ibid.*, s. 29	P. S. for 14 years
Person employed in, opening or delaying letters.	M.	*Ibid.*, s. 25	Fine, or imprisonment with hard labour, or both
Receiving stolen letters, &c. . .	F.	*Ibid.*, s. 30	P. S. for life .
Fraudulently retaining letters . .	M.	*Ibid.*, s. 31	Fine, or imprisonment with hard labour
Injuring letter boxes	M.	47 & 48 Vict. c. 76, s. 3 . .	Impt. with hard labour for 12 months
Sending explosives or indecent prints by post.	M.	*Ibid.*, s. 4 (1)	*Ibid.*
Unlawfully opening or impeding letters .	M.	54 & 55 Vict. c. 46, s. 10 .	Fine £50, or imprisonment with hard labour for 6 months
Soliciting commission of offence under the Post Office laws.	M.	7 Will. IV. and 1 Vict. c. 36, s. 36	Impt. with hard labour for 2 years
Public Services:			
Larceny or embezzlement by persons in.	F.	24 & 25 Vict. c. 96, ss. 69, 70, 97	P. S. for 14 years
Public Stores:			
Applying marks of, without authority .	M.	38 & 39 Vict. c. 25, s. 4 . .	Impt. with hard labour for 2 years
Destroying marks of, with intent to conceal H.M.'s property in.	F.	*Ibid.*, s. 5	P. S. for 7 years
Rape. *See* **Women and Girls.**			

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TABLE OF PRINCIPAL OFFENCES—*continued.*

Description of Offence.	Felony or Misdemeanor.	Statutes, &c., by which it is created.	Maximum Punishment.
Receiving:			
Where theft was a felony . . .	F.	24 & 25 Vict. c. 96, s. 91 .	P. S. for 14 years
,, ,, ,, misdemeanor . .	M.	*Ibid.*, s. 95	P. S. for 7 years
Register:			
Defacing, forging, as to birth, baptism, marriage, death or burial, or giving a false certificate.	F.	24 & 25 Vict. c. 98, s. 36 .	P. S. for life
Similar offences as to a copy of a register required to be transmitted.	F.	*Ibid.*, s. 37	*Ibid.*
Registration and Marriage Acts:			
False declarations and representations .	M.	3 & 4 Vict. c. 72, s. 4; 19 & 20 Vict. c. 119, s. 18.	Punishable as perjury
False statement for insertion in register of birth, death, or marriage.	M.	6 & 7 Will. IV., c. 86, s. 41 .	*Ibid.*
Registrar issuing licence for a void marriage	F.	7 Will. IV. and 1 Vict. c. 22, s. 3	P. S. for 7 years
Robbery. *See* **Larceny.**	F.	24 & 25 Vict. c. 96, s. 40. .	P. S. for 14 years
Assault with intent to rob . . .	F.	*Ibid.*, s. 42	*Ibid.*
Being armed, or with another person, or with personal violence.	F.	*Ibid.*, s. 43	P. S. for life
Sacrilege:	F.	*Ibid.*, s. 50	*Ibid.*

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Ship:			
Impeding any person endeavouring to save his life from ship in distress.	F.	24 & 25 Vict. c. 100, s. 17 .	*Ibid.*
Slave-Trading:			
Carrying away or detaining any person as a slave.	F.	5 Geo. IV., c. 113, s. 9 . .	*Ibid.*
Dealing in slaves	F.	*Ibid.*, s. 10	P. S. for 14 years
Equipping a vessel for slave-trading or insuring slaves or property employed in slave-trading.	F.	*Ibid.*	*Ibid.*
Serving on a slave ship . . .	M.	5 Geo. IV., c. 10, s. 11 . .	Impt. for 2 years
Smuggling:			
Assembling with others for the purpose of	M.	42 & 43 Vict. c. 21, s. 10, and 39 & 40 Vict. c. 36, s. 189.	Fine £100—£500
So assembling when armed or disguised .	M.	*Ibid.*	Impt. with hard labour for 3 years
Procuring others so to assemble . .	M.	*Ibid.*	Impt. for 12 months
Sodomy:	F.	24 & 25 Vict. c. 100, s. 61 .	P. S. for life
Attempt, or assault with intent to commit	M.	*Ibid.*, s. 62	P. S. for 10 years
Treason:			
High treason	F.	Common Law, and see 25 Edw. III., stat. 5, c. 2.	Death by hanging or beheading.
Treason-felony	F.	11 Vict. c. 12, s. 3 . . .	P. S. for life
Women and Girls:			
Rape	F.	Common Law, and 24 & 25 Vict. c. 100, s. 48.	*Ibid.*

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TABLE OF PRINCIPAL OFFENCES—*continued.*

Description of Offence.	Felony or Misdemeanour.	Statutes, &c., by which it is created.	Maximum Punishment.
Women and Girls—*continued.*			
Procuring connection with, under 21	M.	48 & 49 Vict. c. 69, s. 2 (1)	Impt. with hard labour for 2 years
,, to become a common prostitute	M.	*Ibid.*, s. 2 (2)	*Ibid.*
,, to leave the United Kingdom	M.	*Ibid.*, s. 2 (3), (4)	Impt. with hard labour for 2 years
,, to become the inmate of a brothel.	M.	*Ibid.*, s. 2 (4)	*Ibid.*
Procuration by threats or false pretences	M.	*Ibid.*, s. 3 (1), (2)	*Ibid.*
Administering drugs to procure connection.	M.	*Ibid.*, s. 3 (3)	*Ibid.*
Carnally knowing a girl under 13	F.	*Ibid.*, s. 4	P. S. for life
Attempting the foregoing	M.	*Ibid.*	Impt. with hard labour for 2 years
Carnally knowing girl between 13 and 16, or an idiot.	M.	*Ibid.*, s. 5 (1), (2)	*Ibid.*
Permitting girls under 13 to resort to premises for unlawful carnal knowledge.	F.	*Ibid.*, s. 6 (1)	P. S. for life
The like if girl is between 13 and 16	M.	*Ibid.*, s. 6 (2)	Impt. with hard labour for 2 years
Abduction of unmarried girl under 18	M.	*Ibid.*, s. 7	*Ibid.*
Detention for unlawful carnal knowledge or in a brothel.	M.	*Ibid.*, s. 8	*Ibid.*
Indecent assault	M.	24 & 25 Vict. c. 100, s. 52	*Ibid.*

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CHAPTER XII.

REGULATIONS AS TO PUNISHMENTS.

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Punishments which may be inflicted.

THE following punishments may be inflicted in her Majesty's navy :

(1.) Death.
(2.) Penal servitude :
(3.) Dismissal with disgrace from her Majesty's service :
(4.) Imprisonment or corporal punishment :
(4A.) Detention.
(5.) Dismissal from her Majesty's service :
(6.) Forfeiture of seniority as an officer for a specified time, or otherwise :
(7.) Dismissal from the ship to which the offender belongs :
(8.) Severe reprimand, or reprimand :
(9.) Disrating a subordinate or petty officer :
(10.) Forfeiture of pay, head money, bounty, salvage, prize money, and allowances earned by, and of all annuities, pensions, gratuities, medals, and decorations granted to the offender, or of any one or more of the above particulars ; also, in the case of desertion, of all clothes and effects left by the deserter on board the ship to which he belongs :
(11.) Such minor punishments as are now inflicted according to the custom of the navy, or may from time to time be allowed by the Admiralty.

And each of the above punishments shall be deemed to be inferior in degree to every punishment preceding it in the above scale. [Sec. 52, N. D. Act.]

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The punishments applicable to every offence are given in the various sections of Part I. of the Naval Discipline Act. The following regulations as to these punishments are gathered from Part III. of the Act, and from the Admiralty Instructions, which must be consulted if fuller details be required.

1. *Death.*

a. Sentence of death not to be passed unless four out of five members, where the court does not consist of more, and in other cases not less than two-thirds, concur in the sentence. [N. D. Act, s. 53 (2).]

b. Not to be awarded summarily. [Ibid. s. 56 (2).]

c. Except in cases of mutiny, not to be inflicted until sentence has been approved by Admiralty, or commander-in-chief on a foreign station. [Ibid. s. 53 (3).]

d. Sentence can be remitted by his Majesty only. [Ibid. s. 53 (1).]

2. *Penal Servitude.*

a. May be awarded for life, or any other term of not less than three years. [Ibid. s. 53 (4); 54 & 55 Vict. c. 69, s. 1.] The Penal Servitude Act, 1891 [54 & 55 Vict. c. 69, s. 1], enacts that (1) "Where under any enactment in force when this section comes into operation (*i.e.*, 5th August, 1891), a court has power to award a sentence of penal servitude, the sentence may, at the discretion of the court, be for any period not less than three years, and not exceeding either five years, or any greater period authorized by the enactment. (2) Where under any Act now in force or under any future Act a court is empowered or required to award a sentence of penal servitude, the court may in its discretion, unless such future Act otherwise provides, award imprisonment for any term not exceeding two years, with or without hard

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labour." Therefore at the present day, naval courts-martial can award not less than three years' penal servitude up to penal servitude for life. If, however, they wish to give a lighter punishment, they may give imprisonment to the extent of two years with hard labour. But where courts-martial try offences punishable by ordinary law, they may not award a longer term of penal servitude than is specified in the Act creating the offence, and if no term is specified, then the maximum term is in all cases five years.

b. Involves dismissal with disgrace, and the consequences thereof. [N. D. Act, s. 53 (5).]

c. Requires the warrant of the commander-in-chief, senior officer *in command of the station*, or officer who ordered the court-martial, to carry the sentence into execution. [Ibid. s. 70.]

3. *Dismissal with Disgrace.*

"Whenever an option is left by the Naval Discipline Act, the sentence of 'Dismissal with disgrace from his Majesty's service' should, as far as possible, be reserved in the case of officers, for the punishment of offences of a disgraceful nature, which render the offenders utterly unfit to serve his Majesty again in any naval, military, or civil service, or to associate with officers and gentlemen.

"Great discrimination should be exercised in awarding this sentence to petty and non-commissioned officers, seamen, and marines, in order to prevent the sentence from losing its effect by being used as a punishment for offences which are not, according to the custom of the service, regarded as *disgraceful.*

"A court-martial has always the power to sentence an offender to dismissal from his Majesty's service, without, however, sentencing him to dismissal from his

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Majesty's service *with disgrace* (except in the case of an officer convicted of a charge, drawn under sec. 28 of the Naval Discipline Act, of cruelty or of any scandalous or fraudulent conduct, in which case the offender must be dismissed with disgrace from his Majesty's service). The court has also the power, under sec. 52 (10) of the Naval Discipline Act, to award the whole or any part of the forfeitures which, under sec. 53 (6) of that Act, accompany dismissal with disgrace." [Adm. Inst. 695a (v.); C. M. Memo. p. 43.]

A sentence of dismissal with disgrace shall involve in all cases a forfeiture of all pay, head money, bounty, salvage, prize money, and allowances that have been earned by, and of all annuities, pensions, gratuities, medals, and decorations that may have been granted to the offender, and an incapacity to serve his Majesty again in any military, naval, or civil service, and may also in all cases be accompanied by imprisonment [N. D. Act, s. 53 (6)] and corporal punishment. [Ibid. s. 53 (9). The infliction of corporal punishment is at present suspended.]

4. *Imprisonment and Detention.*

a. Imprisonment may be awarded for any term not exceeding two years [Ibid. s. 53 (7). *See also* Penal Servitude Act, 1891 (54 & 55 Vict. c. 69, s. 1), above], with or without hard labour. [N. D. Act, s. 53(9).] The Admiralty direct that the term "calendar month" is to be used when a sentence of imprisonment is passed in months.

b. Imprisonment may be accompanied with solitary confinement for any period of such term, not exceeding fourteen days at any one time, and not exceeding eighty-four days in any one year, with intervals between the periods of solitary confinement of not less duration than the periods of solitary confinement; and where the imprisonment awarded exceeds eighty-four days, the

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solitary confinement must not exceed seven days in any twenty-eight days of the whole imprisonment awarded, with intervals between the periods of solitary confinement of not less duration than such periods. [N. D. Act, s. 53 (8).] Although the Naval Discipline Act permits a court-martial to award imprisonment accompanied with solitary confinement, yet the present Admiralty Instructions lay down that sentences of imprisonment are not to direct that the prisoner shall be kept in solitary confinement. [Adm. Inst. 695a (ii.); C. M. Memo., p. 43.] The rules of the prison in which a man may be confined govern this matter.

c. Corporal punishment may be awarded in addition. [N. D. Act, s. 53 (9).] (See pp. 246—7.)

d. By the Naval Discipline Act detention may be inflicted for a term not exceeding two years. The Admiralty Instructions recommend limits of nine calendar months as a maximum, and ten days as a minimum [N. D. Act, s. 53 (9A); Adm. Inst. 695a (*d*); C. M. Memo., p. 43]; and that it shall

e. not be awarded except to offenders convicted of disciplinary offences only [Adm. Inst. 695a (*c*); C. M. Memo., p. 43]; also that it shall

f. not as a rule be awarded in addition to dismissal from the service [Ibid. (*e*)].

g. Imprisonment or detention, whether on board ship or on shore, involves disrating in the case of a petty officer, and reduction to the ranks in the case of a non-commissioned officer of marines, and in all cases is accompanied by stoppage of pay during the term of imprisonment or detention, but where the detention does not exceed fourteen days, the sentence may direct that the punishment be not accompanied by stoppage of pay. [N. D. Act, s. 53 (10).]

h. Courts-martial are recommended not to award imprisonment for disciplinary offences only, except when

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a longer sentence than nine calendar months is considered desirable, or when the offender is also sentenced to be dismissed from the service, or in parts of the world where there are neither naval detention quarters nor military detention barracks in which the offender can be confined. [Adm. Inst. 695a (*b*); C. M. Memo., p. 43.]

i. Imprisonment or detention requires the warrant of the Admiralty, commander-in-chief, senior officer in command of the station, officer who ordered the court-martial, or officer who sentenced the prisoner, to carry the sentence into execution. [N. D. Act, s. 74 (3).]

j. Penal servitude, imprisonment, or detention is to be reckoned as commencing on the day on which the sentence was awarded [Ibid. s. 74 (1)], but where an offender is already serving a sentence of detention, imprisonment, or penal servitude passed upon him by a court-martial for a former offence, the court may order that the sentence of detention, imprisonment, or penal servitude for which he is under trial is to commence at the expiration of the former sentence. Provided that nothing in this section shall cause a person to undergo imprisonment or detention for any period exceeding in the aggregate two consecutive years, and so much of any term of imprisonment or detention imposed on a person by a sentence in pursuance of this section as would prolong the total term of his punishment beyond that period shall be deemed to be remitted [Ibid. s. 73]; it cannot legally be ordered to commence from the date of expiration of a *summary* sentence. [Adm. 10th Nov., 1896.]

5. *Corporal Punishment.*

a. Limited to forty-eight lashes. [N. D. Act, s. 53 (11).] The infliction of corporal punishment is at present suspended. [Adm. Inst. 695a (note); C. M. Memo., p. 42.] Courts-martial are recommended not to include the award of corporal punishment or birching

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in any sentence, but in the event of the court awarding it, it is not to be carried out without the previous approval of the Admiralty. [Adm. Inst. 695a (note); C. M. Memo., p. 42.]

b. To be deemed equal in degree to imprisonment, and may be awarded as a substitute for, or in addition to it. [N. D. Act, s. 55.] But the judge-advocate considered that the converse, *i.e.*, the modification of a sentence of forty-eight lashes into one of two years' imprisonment, was not proper.

c. No petty or non-commissioned officer is subject to corporal punishment, except for mutiny. [Ibid. s. 53 (11).]

d. Except in the case of mutiny, no man is to be sentenced by the commanding officer to corporal punishment, until his offence has been inquired into by one or more officers. [Ibid. s. 56 (4).]

6. *Dismissal from His Majesty's Service.*

a. Compulsory in case of officers found guilty of unbecoming conduct. [N. D. Act, s. 28.]

b. Court may award the whole or any part of the forfeitures mentioned in s. 52 (10). [Ibid. s. 53 (6).]

7. *Forfeiture of Seniority as an Officer for a Specified Time or otherwise.*

Sentences placing officers at the bottom of the list, either permanently or for specified periods, having been found to be injurious to the interests and discipline of the service, no officer is to be sentenced to be placed permanently or for a specified period at the bottom of the list of his rank, but this regulation is not to prevent an officer being sentenced to be placed at the bottom of the list, allowing him to rise from the date of the court-martial. [Adm. Inst. 695a (iii.); C. M. Memo., p. 43.]

The sentence of a court-martial placing an officer at the bottom of the list of his rank, will involve the loss

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of all previous time of service in that rank; so also when the sentence of a court-martial may take away any seniority from an officer, it will thereby affect his full and half or retired pay, or pension, in cases where the same depend upon seniority; and it will carry with it the loss of the benefit of the service included in the seniority forfeited, in cases where the full, half or retired pay, or pension, depend upon actual service; but although the time will be forfeited, it is to be considered as service in reference to compulsory removal from the active list. [Adm. Inst. 695a (iv.); C. M. Memo., p. 43.]

In the case of a chief gunner, chief boatswain, or chief carpenter, or a warrant officer, the forfeited seniority or service may be dealt with under Art. 1907, sub-clause *j*.

The Navy List not being an official record of the officers of the navy, sentences should not remove officers any specified number of places down the list. [A. O. 8th May, 1877.]

8. *Disrating a Petty Officer.*

The rating to which petty officers can be reduced will be found in the Admiralty Instructions, Appendix XV.A, part 1, column 5, the principle being that no one should be reduced below the "man's" rating first held by him.

In every case in which a chief petty officer or petty officer is disrated summarily for misconduct, a summary of the proceedings at the investigation is to be drawn up at the time in the form prescribed, and is to be attached to the punishment warrant. [Adm. Inst. 766a.]

Punishment under N. D. Act.

From the foregoing, and from Parts I. and II. of the Act, it will be seen that its sections contain instances:—

Peremptory.

(i.) In which the punishment specified is peremptory, admitting of neither alternative nor diminution, viz.:—

Secs. 2, 3, and 5.

Traitorous conduct.	Punishment: death.

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Sec. 28.

Cruelty, scandalous or fraudulent conduct on the part of officers.	Punishment: dismissal from her Majesty's service with disgrace.
Conduct unbecoming the character of an officer.	Punishment: dismissal from her Majesty's service.

(ii.) In which—a solitary instance—sec. 37, as to "stirring up disturbance," leaves the punishment entirely to the discretion of the court. Discretionary.

(iii.) In which the main penalty necessarily involves some lesser consequence, viz.:— Involved.

(*a*) As to penal servitude involving dismissal with disgrace under sec. 53 (5).

(*b*) As to dismissal with disgrace involving various forfeitures under sec. 53 (6).

(*c*) As to imprisonment or corporal punishment involving disrating in the case of petty and non-commissioned officers under sec. 53 (10); also various minor punishments under the Admiralty Instructions, Chap. XIX.:—

In none of which instances is it necessary to quote in the sentence the various penalties involved.

(iv.) In which some lesser penalty may be added to the main award: Additive.

(*a*) Imprisonment may be added to dismissal with disgrace under sec. 53 (6).

(*b*) Solitary confinement (sec. 53 (8)) and (*c*) hard labour (s. 53 (9)) may be added to imprisonment.

(v.) In which—the most numerous class—the words "or such other punishment as is herein-after mentioned," permit one or more lesser penalties to be substituted for, but not added to, the specified maximum. Alternative.

The alternative awards which come under class v. are regulated by sec. 55 as follows:—

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. . . . where any punishment is specified by this Act as the penalty for any offence, and it is further declared that another punishment may be awarded in respect of the same offence, the expression "other punishment" shall be deemed to comprise any one or more of the punishments inferior in degree to the specified punishment, according to the scale herein-before mentioned; but corporal punishment shall be deemed equal in degree to imprisonment, and may in all cases, subject to the foregoing regulations, be inflicted as a substitute for or in addition to imprisonment.

Classes of punishments must be distinguished.

In framing sentences, courts-martial should exercise careful discrimination as to the distinctions enumerated in the foregoing classes. And it should be observed that, except in regard to corporal punishment and imprisonment which are equal *and* additive, sec. 55 must be regarded as coming into operation only in the event of the court desiring not to award the maximum, and deciding to inflict a lesser alternative. It would then award one *or more* penalties inferior in degree to the specified maximum. It is thus that the frequent award of imprisonment *and* dismissal from the service is legal, for there is no direct authority in sec. 53, sub-ss. 7 to 10, to combine these two penalties. Obviously the addition to the main award, of a penalty intended as an alternative, would constitute an excess of the specified maximum.

Limitation of term of imprisonment for offences punishable by ordinary law.

The infliction of the punishment of imprisonment in the navy is limited by sub-s. 7 of sec. 53 to a term not exceeding two years. This limitation must be borne in mind in cases where the offence before the court is not particularly specified in the Naval Discipline Act, but is punishable by ordinary law. In such a case it is considered, on the one hand, that the limit of two years specifically imposed by the Naval Discipline Act cannot, under the generally implied authority of sec. 45, be safely exceeded even though a greater sentence might be permitted by the criminal law; and, on the other hand, that

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the limit imposed by the criminal law (see table in Chap. XI.) must not be exceeded even though it be less than the two years permitted by the Naval Discipline Act.

Imprisonment of offender already under sentence for previous offence.

But cumulative punishment may be inflicted where the offender has already been tried, convicted, and sentenced by a court-martial, but not summarily or otherwise, on another distinct charge; the court may then apply sec. 73 of the statute:—

Whenever sentence shall be passed by a court-martial on an offender already under sentence either of imprisonment or of penal servitude, passed upon him by a court-martial for a former offence, the court may award sentence of imprisonment or penal servitude for the offence for which he is under trial to commence at the expiration of the imprisonment or penal servitude to which he has been previously sentenced, although the aggregate of the terms of imprisonment or penal servitude may exceed the term for which either of those punishments could be otherwise awarded.

Authorities having power to try offences.

Sec. 56 makes provision as to the authorities who shall have power to try and punish offences, viz.:—

56. (1.) Any offence triable under this Act may be tried and punished by court-martial.

(2.) Any offence not capital which is triable under this Act, and (except in the cases by this Act expressly provided for) is not committed by an officer, may, under such regulations as the Admiralty from time to time issue, be summarily tried and punished by the officer in command of the ship to which the offender belongs at the time either of the commission or of the trial of the offence, subject to the restriction that the commanding officer shall not have power to award penal servitude or to award imprisonment for more than three months.

(3.) The power by this section vested in an officer commanding a ship may,—

(*a.*) as respects persons on board a tender to the ship, be exercised, when the tender is absent from the ship, by the officer in command of the tender; and

(*b.*) as respects persons on board any boat or boats belonging to the ship, be exercised, when such boat or boats is or are absent on detached service, by the officer in command of the boat or boats; and

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(c.) as respects persons subject to this Act on shore on detached service, or such of those persons as are not for the time being made subject to military law by an order under section one hundred and seventy-nine of the Army Act, 1881, be exercised by the officer in immediate command on shore of those persons.

(4.) Except in case of mutiny, no man shall be sentenced by the commanding officer to corporal punishment until his offence has been inquired into by one or more officers appointed by such commanding officer, and his or their opinion as to the guilt or innocence of the prisoner reported to such commanding officer, and the commanding officer shall thereupon act as according to his judgment may seem right. [Summary infliction suspended till further orders. Adm. Inst. 695a, note ; C. M. Memo., p. 42.]

Punishment of subordinate officers.

Sec. 57 makes provision as to the authorities who may inflict certain punishments on subordinate officers, viz. :—

(1.) With respect to any subordinate officer, the punishment of forfeiture of time or seniority may be imposed as follows : namely, by the Admiralty for any time not exceeding twelve months, by the Commander-in-Chief on a foreign station for any time not exceeding six months, or by the commanding officer for any time not exceeding three months :

(2.) With respect to any subordinate officer, the Commander-in-Chief on a foreign station shall have power to impose the punishments numbered (7.), (8.), and (9.), in the scale herein-before contained (sec. 52).

The term "subordinate officer" includes the following: midshipmen, naval cadets, clerks, assistant clerks.

Punishment of other officers.

There is no punishment authorized to be awarded to other officers except by court-martial ; but

The 56th section of the Naval Discipline Act is not considered, in its application to "officers," to refer to those ordinary indulgences which the officer in command may or may not think it expedient to allow, according to the exigencies of the service, or to the circumstances of individual cases ; therefore, the withholding of leave from officers is not contrary to the provisions of the Act. [A. L. 1st Feb., 1864, *L.* See Adm. Inst. 844.]

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CHAPTER XIII.

EXECUTION OF SENTENCE.

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Review of sentence by the Admiralty.

WHENEVER sentence has been passed on an offender, and punishment awarded by court-martial, no alteration of the sentence can be made, except by the Admiralty, to whom the power of review has, with the single exception of sentence of death, been entrusted by the legislature: thus the only appeal from the sentence of a naval court-martial is as provided in the following regulation:—

> The Admiralty may, except in case of sentence of death, which shall only be remitted by her Majesty, suspend, annul, or modify any sentence passed on any person subject to this Act, or substitute a punishment inferior in degree for the punishment involved in any such sentence, or remit the whole or any portion of the punishment involved in any such sentence, or remit the whole or any portion of any punishment into which the punishment involved in any such sentence has been commuted, and any sentence so modified shall (subject to the provisions of this Act) be valid, and shall be carried into execution, as if it had been originally passed, with such modification, by the court-martial; but so that the punishment involved in any sentence be not increased by any such modification. [N. D. Act, s. 53, cl. 1.]

So if a prisoner be convicted on three charges and sentenced, and the conviction on the first charge be quashed, the sentence holds good if the punishment be legal for the two other offences.

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Limit to authority of commander-in-chief.

Except where the sentence awards "death," "corporal punishment" or "imprisonment," in which cases under secs. 53 (3) and 78 of the Act and Art. 696 of the Admiralty Instructions certain powers are vested in commanders-in-chief, such officers have no power to remit sentences either in the whole or in part, and any suspensory action taken by them must be on their own responsibility, subject to the approval of the Admiralty.

Where authority of commander-in-chief is required.

v. . . . where the Commander-in-chief may be required to carry the sentence into execution, the original proceedings are to be sent to him in the first instance, for transmission to the Admiralty in due course.

vi. If the sentence, or any portion of it, should have to be carried into effect in England under the authority of the Admiralty, the original minutes should invariably be sent in time to get there before the person under sentence. [Adm. Inst. 697a.]

With certain exceptions, the sentences of naval courts-martial do not require approval or confirmation before taking effect. The legal sentence of a court-martial duly promulgated is at all times a sufficient authority to the proper officers to carry such sentence into effect; therefore, except where the special authority of the Admiralty, commander-in-chief, senior officer in command of the station, or officer who ordered the court-martial, is required to carry the sentence into effect by warrant, the prisoner's commanding officer need not receive any intimation other than the pronouncement of the sentence in open court, though latterly it has become the custom for the commander-in-chief to send a written communication.

The following are the punishments in which special authority is required to carry the sentence into execution:

1. Death.
2. Penal servitude.
3. Imprisonment.
4. Corporal punishment.

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1. *Death.*

Except in case of mutiny, the punishment of death shall not be inflicted on any prisoner until the sentence has been confirmed by the Admiralty or by the commander-in-chief on a foreign station. [Sec. 53, cl. 3, N. D. Act.] Death.

The prerogative of mercy is in the Crown, and by sec. 53 sentence of death can only be remitted by his Majesty; so that after judgment has been passed, there can be no further hope for a condemned criminal, except through the presentation of a memorial to the King in Council. Except in cases of mutiny, it is impossible to specify in the sentence of the court-martial any particular time for the execution, as the confirmation of the Admiralty at home, or that of the naval commander-in-chief on a foreign station, is required, before it can be carried into effect. This regulation allows a sufficient interval for the reconsideration of the sentence if necessary; and the grave responsibility that naturally attaches to an officer who has authority in a case where life is at stake, demands that the commander-in-chief on a foreign station should in all cases carefully peruse the minutes of the court-martial, and satisfy himself that there are no grounds on which the execution of the sentence ought to be respited. If the sentence be accompanied with a recommendation to mercy, it would be his duty, if he thought that there was any sufficient foundation for the prayer, to forward the recommendation for the consideration of the Admiralty, in order that it might, with the sanction of the Board, be submitted to his Majesty. Remission of sentence. Recommendation to mercy.

The authority of the naval commander-in-chief on a foreign station extends no further; for he has no power to pardon persons sentenced to the punishment of death. But as the execution of the sentence is entrusted to him without any limitation as to time, he may, when he thinks proper, forward a report to the Admiralty, and

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postpone the moment of execution, until the pleasure of his Majesty on the subject be made known to him.

Execution of sentence.

When sentence of death is to be executed upon any criminal, notice shall be previously given from the ship by a signal and by firing a gun, upon which the captains of all ships present shall summon their ships' companies upon deck to witness the punishment, and shall make known to them the crime for which it is about to be inflicted. [Adm. Inst. 696a.]

A form of warrant for the execution of the sentence is given in Appendix II., No. 18; C. M. Memo., p. 77.

2. *Penal Servitude.*

Disposal of offender after sentence of penal servitude.

Where a person is in pursuance of this Act convicted by a court-martial, and either is sentenced or has his sentence commuted to penal servitude, such conviction and sentence shall be of the same effect as if such person had been convicted by a civil court in the United Kingdom of an offence punishable by penal servitude and sentenced by that court to penal servitude, and all enactments relating to a convict so sentenced shall, so far as circumstances admit, apply accordingly; and the said convict shall be removed to some prison in which a convict so sentenced by a civil court in the United Kingdom can be confined either permanently or temporarily, and the order of the Admiralty, or of the Commander-in-Chief, or of the officer ordering the court-martial by whom such person was convicted, shall be a sufficient warrant for the transfer of the said person to such prison to undergo his sentence according to law, and until he reaches such prison for his detention in naval custody, or in any civil prison or place of confinement. [N. D. Act, s. 70.]

If a court-martial awards a sentence of penal servitude, a certificate for the keeping of the prisoner in penal servitude must be issued either by the Admiralty, the Commander-in-Chief, or the officer ordering the court-martial. The senior officer present, unless in command of the station, or unless he ordered the court-martial, has not any authority to sign such certificate. [Adm. Inst. 696a (ii.); C. M. Memo., p. 44.]

For form of warrant for the detention of offenders

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under sentence of penal servitude, see Appendix II., No. 20.

3. *Imprisonment.*

Whenever sentence shall be passed by a court-martial on an offender already under sentence either of detention, imprisonment or penal servitude, passed upon him by a court-martial for a former offence, the court may award sentence of detention, imprisonment, or penal servitude for the offence for which he is under trial to commence at the expiration of the detention, imprisonment, or penal servitude to which he has been previously sentenced, although the aggregate of the terms of detention, imprisonment, or penal servitude may exceed the term for which any of those punishments could be otherwise awarded. Provided that nothing in this section shall cause a person to undergo imprisonment or detention for any period exceeding in the aggregate two consecutive years, and so much of any term of imprisonment or detention imposed on a person by a sentence in pursuance of this section as would prolong the total term of his punishment beyond that period shall be deemed to be remitted. [N. D. Act, s. 73.]

Term and places of imprisonment, &c.

(1.) Every term of penal servitude, imprisonment, or detention in pursuance of this Act shall be reckoned as commencing on the day on which the sentence was awarded, and the place of imprisonment or detention, whether the imprisonment or detention was awarded as an original or as a commuted punishment, shall be such place as may be appointed by the court or the commanding officer awarding the punishment, or which may from time to time be appointed by the Admiralty, or by the commander-in-chief or senior officer present on any foreign station, and may in the case of imprisonment be one of the naval prisons appointed under this Act, or naval detention quarters, or any common gaol, house of correction, or military prison or detention barrack, and may in the case of detention be any naval detention quarters or a military detention barrack within her Majesty's dominions.

(2.) Where, by reason of a ship being at sea or off a place at which there is no proper prison or naval detention quarters, a sentence of imprisonment or detention as the case may be cannot be duly executed, then, subject as herein-after mentioned, an offender under sentence of imprisonment or detention as the case may be may be sent with all reasonable speed to some place at which there is a proper prison or naval deten-

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tion quarters, or, in the case of an offender under sentence of detention, to some place at which there are naval detention quarters in which the sentence can be duly executed and on arrival there the offender shall undergo his sentence, in like manner as if the date of such arrival were the day on which the sentence was awarded, and that notwithstanding that in the meanwhile he has returned to his duty or become entitled to his discharge ; and the term of imprisonment or detention as the case may be shall be reckoned accordingly, subject however to the deduction of any time during which he has been kept in confinement in respect of the said sentence.

(3.) Where in pursuance of this Act a person is sentenced to imprisonment or detention, the order of the Admiralty or of the commander-in-chief, or of the officer ordering the court-martial by which such person was sentenced, or if he was sentenced by the commanding officer of a ship, the order of such commanding officer, shall be a sufficient warrant for the sending of such person to the place of imprisonment or detention there to undergo his sentence according to law, and until he reaches such place of imprisonment or detention, for detaining him in naval custody, or in the case of a person sentenced to imprisonment in any civil prison or place of confinement. [N. D. Act, s. 74.]

Consular gaols.

It will be observed that the restriction in clause 1, "within her Majesty's dominions," excludes all British consular gaols or other prisons within foreign states.

Custody of persons convicted abroad.

The Admiralty or the commander-in-chief or the officer ordering the court-martial shall in every case issue a warrant in the prescribed form for the imprisonment or detention of the person sentenced. By virtue of sec. 74 (2) of the Naval Discipline Act such warrant may, in cases where by reason of a ship being at sea or off a place at which there is no proper place of confinement, direct that the offender shall be sent to the lawful place of confinement named therein, and that the period of his sentence shall commence on his arrival there, subject to a deduction from his sentence of any time during which he has been kept in confinement in respect of the said sentence. The senior officer present, unless in command of the station or unless he ordered the court-martial, has not any authority to sign such warrant.

Every person upon whom a sentence of penal servitude, imprisonment or detention has been passed shall be kept in

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naval custody [1] until the certificate or warrant mentioned above has been issued. [Adm. Inst. 696a (iii) and (iv.).]

Men sentenced to imprisonment cannot legally be confined to cells on board ship whilst waiting passage to prison. The use of cells in such case is not legal except as a means of restraint or in case of violent behaviour. [Admiralty, 5th Nov., 1886.]

Where court appoints.

When under cl. 1 of sec. 74 of the Naval Discipline Act, the court in its sentence appoints the place of imprisonment, it would appear that the warrant of the commander-in-chief or senior officer present on a foreign station is not required as an authority to the gaoler to receive the prisoner in pursuance of the terms of the sentence. In such a case, a copy of, or an extract from, the sentence, attested by the president, officiating judge-advocate, or senior officer present at the time, would be sufficient authority.

Change of place of imprisonment.

On foreign stations, where there are prisons in which (sec. 74) naval offenders under sentence of court-martial can legally be confined, it is usual to imprison them in such prisons, and to send those under long sentences to England, when an opportunity occurs, in one of his Majesty's ships. Under sec. 74, authority is vested in a commander-in-chief and other authorities on any foreign station thus to confine any such prisoner. (Form, Appendix II., No. 22.)

Should it be desired to send the offenders to England to undergo the remainder of their sentences, the commander-in-chief is empowered, under section 75, to change the place of imprisonment:—

Whenever it is deemed expedient it shall be lawful for the

[1] Naval custody, according to Art. 760 of the Admiralty Instructions, may be either open or close. If the latter, every day or part of a day during which a person is detained in close custody has the effect of reducing by one day the time during which he can be so detained, even in cases where the commencement of the sentence has been postponed under sec. 74 (2) of the Naval Discipline Act. Sec. 79 of the Act provides that the time during which any offender under sentence of imprisonment or detention is detained in naval custody for the purpose of giving evidence, &c., shall count as part of his sentence.

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Admiralty or any such commander-in-chief, by any order in writing, from time to time to change the place of confinement of any offender imprisoned or sentenced to be imprisoned or detained in pursuance of this Act, or of any offender undergoing or sentenced to undergo detention, and the gaoler or other person having the custody of such offender shall immediately on the receipt of such order remove such offender to the gaol, prison, or house of correction, or in the case of an offender undergoing or sentenced to undergo detention, to the naval detention quarters mentioned in the said order, or shall deliver him over to naval custody for the purpose of the offender being removed to such prison or naval detention quarters; and every gaoler or keeper of such last-mentioned prison, gaol, or house of correction or naval detention quarters, shall, upon being furnished with a copy of such order of removal, attested by the Secretary of the Admiralty for the time being, receive into his custody and shall confine pursuant to such sentence or order every such offender. [N. D. Act, s. 75.]

Where the commander-in-chief considers it desirable that a prisoner or person under detention should be sent to England to complete his sentence, he shall issue his warrant for that purpose. In such cases the warrant must be forwarded to the Admiralty when the offender is sent to England, in order that an attested copy of it may be made as the authority for the governor or other officer in charge of the place of confinement to which the offender is transferred to receive and detain him. [C. M. Memo., pp. 45, 78.]

It will be observed that a commander-in-chief cannot change the place of imprisonment *on a foreign station*, under the authority of sec. 75, unless a copy of the order for removal can be first attested by the Secretary of the Admiralty as the authority for the gaoler to receive him.

Carrying out sentence.

In carrying out sentences of imprisonment great care must be taken to follow implicitly the requirements of the Naval Discipline Act. A departure from this rule, in the case of Lieutenant Allen, of the 82nd Regiment, was the cause of several actions for false imprisonment,

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in more than one of which verdict was given for the plaintiff, with damages. (See p. 274.)

Discharge or removal of prisoners.

Whenever any prisoner is undergoing imprisonment or detention in pursuance of this Act, it shall be lawful for the Admiralty or any commander-in-chief on any foreign station, or where an offender is undergoing imprisonment or detention by order of his commanding officer, for such commanding officer or the Admiralty, or any such commander-in-chief, to give an order in writing directing that the offender be discharged; and it shall also be lawful for the Admiralty, or any such commander-in-chief, and any officer commanding any of her Majesty's ships, by order in writing, to direct that any such offender be delivered over to naval custody for the purpose of being brought before a court-martial, either as a witness, or for trial or otherwise, and such prisoner shall accordingly, on the production of any such order, be discharged, or be delivered over to such custody. [N. D. Act, s. 78.]

For form of warrant of release, see Appendix II., No. 23.

4. *Corporal Punishment.*

Mode of punishment.

By "corporal punishment" is to be understood the usual punishment at the gangway; it is to be carried out according to the custom of the service, and in the presence of the captain, the officers, and the ship's company, or so many as can be spared from other duties. Every other description of corporal punishment by rope, stick, or any other instrument is hereby forbidden with the exception of the authorized caning and birching of boys. [Adm. Inst. 752.]

Corporal punishment.

Courts-martial are recommended not to include the award of corporal punishment or birching in any sentence. In the event of a court-martial awarding such punishment, it is not to be carried out without the previous approval of the Admiralty. The infliction of corporal punishment is at present suspended. [Adm. Inst. 695a; C. M. Memo., p. 42.]

Medical examination.

In all cases of imprisonment or of corporal punishment, a medical officer should be called upon to certify in writing that he has examined the offender and found him fit to undergo the punishment awarded.

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CHAPTER XIV.

COURTS OF LAW IN RELATION TO NAVAL JURISDICTION.

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Amenability of naval persons to common law.

MEMBERS of the naval profession are not exempt from the obligation, which the common law of England imposes upon any wrong-doer, to make satisfaction in damages for the injuries which he may have committed or occasioned through malice or negligence against the person, reputation, or property of another; and the excesses of military authority in the course of official duty are peculiarly the subjects of legal jealousy and control. Oppressive or insulting treatment of subordinate officers and others placed under command, was once supposed to be remediable only by bringing such conduct on the part of a superior officer to the judgment of a court-martial. But this point was decided otherwise in the case of *Grant* v. *Shard*.[1] So also an action will lie for unjust treatment under the form of discipline.[2] Civil actions are also maintainable against commissioned officers for exceeding their powers, or for exercising them in an oppressive, injurious, and improper manner,

[1] (1884), 4 Taunt. Rep. 85.
[2] *Swinton* v. *Molloy* (1783), 1 Term Rep. 537.

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whether towards naval persons or others. Extreme difficulties, however, lie in the way of plaintiffs in actions of this nature, for no such action is maintainable for an injury, unless it is accompanied by malice or injustice. If, then, an officer makes a slip in form, great latitude ought to be allowed; but for a corrupt abuse of authority none can be made.

Controlling powers of the courts of law.

The jurisdiction of naval courts-martial and the judicial powers of commanding officers are confined within certain limits by positive enactment; if they pass these limits, they are subject to the controlling authority of the High Court of Judicature, an authority which is exercised over all inferior courts, where they take cognizance of any matter not within their jurisdiction, or where in handling matters clearly within their cognizance they transgress the bounds prescribed to them by the laws of England.[1]

Intervention of the courts of law.

In examining the cases where the intervention of the superior courts has been sought on questions affecting the exercise of naval or military authority, it will be convenient to divide them into the following classes:

1st. Where the superior courts interfere with the proceedings of a court-martial by writ of prohibition.

2ndly. Where the sentence of a court-martial is reviewed on the return to a writ of habeas corpus.

3rdly. Where actions lie against individual members of a court-martial.

4thly. Where actions lie against officers for excess or abuse of authority in the course of their official duties.

1. *Writ of Prohibition.*

When granted.

The superior courts can interfere only by issuing a writ of prohibition, to prohibit any particular proceeding of a court-martial, in those instances in which some-

[1] *Per* Lord Loughborough (1792), in *Grant* v. *Gould*, 2 H. Bl. 101.

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thing is done contrary to the general law of the land, or manifestly out of the jurisdiction of the court; for mere irregularities in the proceedings, where the court has jurisdiction over the charge before it, afford no ground for a prohibition.[1] Applications for a prohibition to restrain courts-martial have hitherto been few, and uniformly unsuccessful.

In *Grant* v. *Gould*[2] it was decided that courts-martial in this country have jurisdiction over all persons receiving pay as soldiers, but are liable to the controlling authority which the High Court shall from time to time exercise for the purpose of preventing them from exceeding their jurisdiction; but the courts will not grant a prohibition to prevent the execution of the sentence of a court-martial passed on a person who has received pay as a soldier (but assumed the military character merely for the purpose of recruiting in the usual course of that service), though the proceedings of the court-martial appeared to be in some instances erroneous.

When refused.

In the matter of *Poe*,[3] an application was made for a writ of prohibition to prohibit the execution of the sentence of a properly constituted court-martial. The Court of King's Bench refused the application on the ground that a prohibition cannot issue to a court-martial, after its sentence has been ratified by the King, and carried into execution. The court agreed with Lord Loughborough's remark, "that it would be extremely absurd to expect the same precision in a charge brought before a court-martial as is required to support a conviction by a justice of the peace."[4]

The Court will not direct a writ of prohibition to a

[1] As to the general law, see the exhaustive opinion of the judges in *Mayor of London* v. *Cox* (1866), L. R. 2 E. & I. App. 239, and the cases there cited.

[2] (1792), 2 H. Bl. 69.

[3] (1832), 5 B. & Ad. 681.

[4] See also *Ex parte Smyth* (1835), 3 A. & E. 724; *Re the Dean of York* (1841), 2 Q. B. 1; *Ex parte Storey* (1852), 8 Ex. 195.

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court-martial merely because the facts which establish the military offence disclose, at the same time, a greater offence (*e. g.* high-treason) cognizable by the civil courts, provided a military offence is clear upon the evidence. The military offence does not merge in the greater offence.[1] Although the writ of prohibition has never actually been issued to a court-martial, there seems no doubt that it might issue in a proper case; as, for example, if a court-martial was proceeding to try a person not subject to military or naval law, or had passed a sentence which they had no power whatever to pass. The question whether a writ of prohibition would issue to an officer exercising individual authority does not appear ever to have been raised. Disobedience of a prohibition is a contempt of court, and, as such, is punishable by fine and imprisonment at the discretion of the court which granted the writ.

2. *Writ of Certiorari.*

Certiorari is a writ issuing out of the High Court of Justice to the judges or officers of inferior courts, and commanding them to certify and return the record of a matter (*e. g.* a conviction or order) depending before them, to the end that more sure and speedy justice may be done. If the conviction or order of the inferior court is found to be bad in law, it will be quashed by the High Court. In ordinary cases the writ is issued on the application of the person aggrieved almost as a matter of course, unless he has by his conduct precluded himself from taking an objection.[2] The court has no jurisdiction over tribunals out of the realm of England, although in countries subject to the British Crown. Where the civil rights of a person in military service are affected by the

[1] *R.* v. *McCarthy* (1866), 14 W. R. 918.
[2] *R.* v. *Justices of Surrey* (1870), L. R. 5 Q. B. 466.

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judgment of a military tribunal, in which that tribunal has acted without jurisdiction, or has exceeded its jurisdiction, the Court of King's Bench will interfere; but it is otherwise where nothing but the military status of the party is affected by the judgment. In *Mansergh's case*,[1] an officer in the army, when stationed with his regiment in India, was gazetted to a majority, and the appointment was notified in the general orders of the commander-in-chief in India at head-quarters and in the regimental orders. Subsequently the officer, having written to the colonel of the regiment an insubordinate letter, was tried by court-martial in India, was dismissed the service, and the proceedings of the court-martial transmitted to the judge Advocate-General in London: three years afterwards, application being made to the Court of King's Bench for a certiorari to bring up the judgment of the court-martial, in order that it might be quashed, the Court refused to interfere.[2]

3. *Writ of Habeas Corpus.*

When granted.

The superior courts will always grant a writ of habeas corpus *to discharge a prisoner illegally detained*, either under warrant of arrest previous to trial, or warrant of detention or imprisonment in pursuance of the sentence of a court-martial, but the illegality must be such as has arisen either from want of or excess of jurisdiction; for if the return to the writ contains sufficient matter in *substance* to show that the prisoner is lawfully detained, the courts will not discharge him, *though the return should be in some respects informal*;[3] for if the sentence of an inferior court having competent jurisdiction to try and punish an offence be unreversed,

When refused.

[1] (1861), 1 B. & S. 400.

[2] See also *Robert's Case*, *Times*, 11th June, 1879; *Re Tufnell* (1876), 3 Ch. D. 164; *R.* v. *Secretary of State*, L. R. [1891] 2 Q. B. 330.

[3] *Per* Lord Abinger; case of the Canadian Prisoners. Fry's Report. See also *Thompson, In re*, *R.* v. *Woodward* (1889), 5 T. L. R. 565, 601.

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the superior court will not assume that it is invalid or not warranted by law, neither will it require that the authority of the inferior court to pass the sentence should be set out by the gaoler on the return; for the superior court *is bound to assume* primâ facie *that the unreversed sentence of a court of competent jurisdiction is correct.*[1] The writ will not, as a rule, issue to question the mode in which military jurisdiction has been exercised;[2] but if a particular formality is by statute requisite to make valid an order (for instance) for imprisonment, and the formality is shown not to have been followed, then it may be granted.[3] It would seem, as a rule, to be a sufficient return to the writ that the person in custody is a person subject to naval law and that all the proceedings were according to naval law.[4]

Thus, in *Rex* v. *Suddis*,[5] where the defendant had been tried before a court-martial at Gibraltar, convicted of receiving stolen goods, and sentenced to fourteen years' transportation: it was held a sufficient return to a writ of habeas corpus that the defendant was in custody under the sentence of a court of competent jurisdiction to inquire into the offence, and to pass such a sentence, without setting forth the particular circumstances necessary to warrant such a sentence. So in *Blake's case*,[6] the court granted a rule nisi for a writ of habeas corpus on behalf of an officer under military arrest for charges of misconduct, on an affidavit complaining that he had not been brought to trial pursuant to the 23rd Article of War as soon as a court-martial could be conveniently assembled; but on its being stated upon the affidavit of the Judge-advocate-general, in answer, that proceedings

[1] *Brenan's case* (1847), 10 Q. B. 502.
[2] *Blake's case* (1814), 2 M. & S. 426.
[3] *Allen's case* (1860), 30 L. J. Q. B. 38.
[4] *R.* v. *Suddis* (1801), 1 East, 306.
[5] (1801), 1 East, 306.
[6] (1814), 2 M. & S. 428.

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were instituted as soon as could conveniently be, and according to the course of office, and that the trial had been postponed partly on account of the absence of the prisoner's witnesses, the court discharged the rule. A somewhat recent case on this point which came before the courts was that of *R.* v. *Cuming and another*.[1] The point decided in the case was that a commissioned officer in the Royal Navy, who has accepted an appointment to serve on board one of her Majesty's ships in commission, and who is entered on the ship's books, is not entitled, without permission from the Admiralty, to resign his commission and to leave his ship. Such an officer does not, by resigning his commission without the permission of the Admiralty, cease to be a person "belonging to her Majesty's navy" within sec. 87 of the Naval Discipline Act, 1866 (29 & 30 Vict. c. 109).

Claim of an officer to resign his commission without authority.

Sec. 50 of the Naval Discipline Act, 1866 (which provides that every officer in command of a fleet or squadron of her Majesty's ships, or of one of her Majesty's ships, or the senior officer present at a port, may by warrant under his hand authorize any person to arrest any offender subject to this Act for any offence against the Act mentioned in such warrant), does not prevent a naval officer, he being a "person subject to the Act" within the meaning of sec. 51, from arresting such offender without a warrant.

Captain William H. Cuming, of the flag-ship Royal Adelaide, and the master-at-arms, were ordered to show cause why a writ of habeas corpus should not issue, directed to them, to bring up Edward Brace Turville Hall in order that he might be discharged from their custody. By order of Lord Coleridge, C. J., the case was argued before a court consisting of four judges.[2]

[1] (1887), 19 Q. B. D. 13.
[2] *Reg.* v. *Cuming, Ex parte Hall*, (1887) 19 Q. B. D. 13.

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The facts and arguments sufficiently appear in the judgment, as follows :—

Case of Lieut. Hall.

The applicant, Lieut. Hall, belonged to her Majesty's ship Orontes. In September, 1886, Lieut. Hall applied for an appointment in the London Salvage Corps. This application was successful; but as the Orontes, upon which he was serving, was then on a cruise, and was not expected to return to England till April, 1887, the committee of the Salvage Corps agreed to wait until that time for him to take up the appointment. On the 29th of October, 1886, Lieut. Hall, by letter to the Admiralty, requested to be allowed to retire, or resign his appointment or his commission, and offered also to pay the passage money for a lieutenant to Gibraltar should he be relieved then. This application was refused. Shortly after this Lieut. Hall learned that the cruise of the Orontes was extended, and that she would not return to this country till the month of July, 1887; and he thereupon forwarded, through his commanding officer, a telegram to the Admiralty requesting leave to retire, with which request the Admiralty refused to comply. Mr. Hall then determined to resign his commission; and on the 1st of February, 1887, the Orontes being then at Simon's Bay, in South Africa, he asked permission of his captain to go to Cape Town till the following afternoon. At this time a notice was standing in the saloon and officers' ward-room intimating that all leave expired at midnight on the 2nd of February; and it was generally known that the captain of the Orontes intended sailing from Simon's Bay as soon after daylight on the 3rd of February as possible. The requested permission to go ashore was granted, and Lieut. Hall thereupon left the ship; but instead of returning the following afternoon pursuant to his leave, he, from the shore, wrote to his captain on the 2nd of February, as follows: "I have the honour to inform you that, in accordance with the

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conditions laid down in Art. 160[1] of the Admiralty regulations, I retire from the service; and I beg to hand you my commission." This he enclosed.

Lieut. Hall thereupon took his passage home in the mail steamer Grantully Castle, which left Table Bay for Plymouth at 4 P.M. on the 2nd of February. The letter which Lieut. Hall wrote to his captain had not been delivered when the Orontes left Simon's Bay on the 3rd February. On the morning of that day, the captain of the Orontes, finding that Lieut. Hall had sailed for England, telegraphed to the Admiralty; and on the arrival of the Grantully Castle in the Sound, Lieut. Hall was arrested by a naval officer, and was taken in his custody to Devonport, where he was detained as a prisoner on board the Royal Adelaide, under the command of Captain Cuming, with a view to his being brought to trial before a court-martial under sec. 19 of the Naval Discipline Act, 1866, for having absented himself from his ship with an intention of not returning. The question raised for our determination is one of great importance—viz., whether a commissioned officer in the Royal Navy who has accepted an appointment to serve on board one of her Majesty's ships, is entitled, without permission from the Admiralty, to resign his commission and to leave his ship. The Judge-Advocate of the Fleet, who showed cause against the rule, contended that the officer's commission bound him to serve in the navy so long as he remained fit to perform his duty and the State required his services. On the other hand, it was contended for the applicant that the commission might be resigned at any time, like an ordinary mandate to one required to act as agent, and that the Crown had no right in time of peace to control the liberty of the subject, or insist upon the performance of duties from which the

[1] Since expunged.

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officer desired to escape. We are unable to agree with either contention. The cases *Parker* v. *Lord Clive*[1] and *Vertue* v. *Lord Clive*[2] would seem to contain a complete condemnation of both propositions. It is not necessary to deal with the case of Lieut. Hall upon any suggestion of an express or implied contract between him and the Crown. His position seems clearly defined by the terms of the Naval Discipline Act, 1866 (29 & 30 Vict. c. 109), ss. 19, 86 and 87.

Lieut. Hall seems to us, at the time when he left his ship without any intention to return, to come clearly within these sections. He was an officer of the Orontes, whose name was borne on the ship's books while the ship was in commission. But it was said that when he left for England he was not a person in or belonging to her Majesty's navy within sec. 87, because he had sent his commission to his captain; and it was urged that every section of the Act, which in terms applies to "persons subject to the Act," must be read as applying only to those who had not so resigned their commissions. If this were so, every officer of one of the Queen's ships might with impunity abandon the ship whenever he pleased. It is obvious that such a construction would be fatal to the spirit and object of the Act. It was further contended that the persons liable to the Act did not include those officers who after reasonable notice and under reasonable circumstances had resigned their commissions; and that the Act, as regards such persons, was inoperative. But this mode of interpreting the statute would lead to this consequence, that it would be always matter of doubt whether an officer who had gone through the form of resigning his commission was still in the navy or not. If his reasons were sufficient, and he was entitled to leave the service, he would not be in the navy;

[1] (1760), 4 Burr. 2419.
[2] (1760), 4 Burr. 2472.

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if he were not in a position to resign his commission, he would still be an officer. His superior officer would have no means of judging as to the sufficiency of the grounds upon which he claimed to resign. If the officer were right, he would be entitled to resist his detention by force, or to bring an action subsequently for false imprisonment. And so, if he were brought to a court-martial, and imprisoned, he might in an action against the officers of the court question their jurisdiction and submit to the jury that when placed under arrest he had ceased to be an officer in the navy.

It is not necessary for us to decide the very grave question whether the mere acceptance of a commission would of itself, and under all circumstances, suffice to bring an officer within the jurisdiction of a court-martial for refusing to enter upon any particular service. Some of us, as at present advised, are of opinion, with Yates, J., in the case cited,[1] that it would not. We leave the question, however, distinctly open to be argued and decided if in any case hereafter it should be necessary to decide it. But we are clearly of opinion that, when a commissioned officer accepts an appointment to serve in one of her Majesty's ships in commission, and enters upon the performance of his duties, he subjects himself to the provisions of the Naval Discipline Act, and at his own will and pleasure cannot resign his appointment, and may be tried by court-martial for any of the offences specified in the Act.

Liability to arrest without warrant.

A further point was made by counsel for Lieut. Hall, that the arrest of Lieut. Hall on board the Grantully Castle was illegal. According to Lieut. Hall's affidavit, which is not contradicted, he was arrested by a naval officer who exhibited no warrant, and who, it must be taken, had none. The contention on the part of Lieut.

[1] (1769) *Vertue* v. *Lord Clive*, 4 Burr. at p. 2477.

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Hall is, that he could only be arrested under such a warrant as is mentioned in sec. 50, and that there was no such warrant in this case. It is to be observed, however, that under such a warrant, not merely a person in her Majesty's navy, but any person, may make the arrest; and further, that, although the section authorizes the person named in the warrant to be taken on board one of her Majesty's ships, it does not authorize his detention on board. Such an authority, if it stood alone, would be a very imperfect instrument for the bringing to punishment of offenders against the Act. There is, however, another section of the Act, the 51st, of a far more effectual character. By that section every person subject to that Act who shall not use his utmost endeavours to detect, apprehend, and bring to punishment all offenders against that Act, and shall not assist the officers appointed for that purpose, shall suffer imprisonment or such other punishment as is thereinafter mentioned. The words are not 'every person to whom a warrant is directed,' but 'every person subject to the Act'; and we think that the necessary inference is that such a person has power to apprehend and bring to punishment any offender against the Act; for it would be manifestly unjust to punish a man with imprisonment for not doing that which he had no power to do.

Moreover, it seems to us, looking at the number and nature of the offences dealt with in the first forty-five sections of the Act, that it would be quite impossible to maintain discipline on board amongst a ship's crew if no offender could be arrested until a warrant had been obtained from the officer in command of the ship. In this case the arrest was effected by a naval officer. It is not stated that he was not a person subject to the Naval Discipline Act. In holding, as we do, that Lieut. Hall is subject to the jurisdiction of a court-martial, we think it right to add that he has acted, as it seems to us, in good

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faith, and in the honest belief that the terms of the regulation referred to entitle him, without permission from the Admiralty, to retire from the service.[1]

Justification for detention.

Where the lawful detention of a prisoner depends upon statutable authority (as must be the case in every instance of imprisonment under the sentence of a court-martial), it is indispensable to show in justification of such imprisonment, that the prisoner is detained under the authority of the specific provisions of the statute in question. A very strict compliance with this rule is requisite, as was determined in the case *Re Allen*.[2]

4. *Actions against Members of Court-martial.*

It appears that an action will lie against any member of a court-martial for an act done by the court-martial collectively, under colour, though not within the scope, of their legal powers.

In the few cases that have occurred, the action has been brought against the president, as being the most eminent in rank and influence; but there is no additional legal liability to distinguish his position from that of any other member of the court.

It is to be observed that two several actions of trespass for false imprisonment cannot be sustained against several members of the court-martial for the same act of imprisonment. If two commit a tort, and the plaintiff recovers against one, he cannot recover against the other for the same tort.[3]

Members of a court-martial who try a person not subject to military law, or for an act which is not an offence cognizable by them, or pass a sentence which

[1] *R.* v. *Cuming and another* (1887), 19 Q. B. D. 13; see also *Hearson* v. *Churchill*, [1892] 2 Q. B. 144.

[2] (1860), 30 L. J. Q. B. 44; *Allen* v. *Boyle*, Times Report, 4th March, 1861.

[3] *Per* Lawrence, J., in *Warden* v. *Bailey* (1811), 4 Taunt. 88.

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they have not power to pass, are all liable to an action at the suit of the person aggrieved; and the officer who confirmed the proceedings will also be liable.[1] The same rule applies to officers in the exercise of individual authority; so soon as they transgress the bounds of their lawful authority they expose themselves to an action, though they may have acted with entire *bona fides*. A sentence of a court-martial, if it exceeds the authorized measure of punishment, is not merely invalid for the excess, but absolutely void altogether.

Case of Lieut. Frye.

The most remarkable case on record of this kind happened in the year 1743. Lieut. Frye of the Royal Marines, after an unnecessary previous confinement for 14 months, was brought to trial before a naval court-martial at Port Royal in the West Indies, and sentenced to be imprisoned for 15 years and dismissed from the service on a charge of disobedience of orders, in refusing to assist in the imprisonment of another officer without an order in writing from the captain of H.M.S. "Oxford," on board of which Lieut. Frye was serving. At the court-martial the written depositions of several illiterate blacks were improperly received in evidence against him, in lieu of their oral testimony, which might have been sifted by cross-examination; and the sentence pronounced was itself illegal for its excessiveness in inflicting imprisonment beyond the term of 2 years. He was brought home, and his case laid before the Privy Council, upon whose recommendation the King remitted the punishment, and ordered him to be released. On the return to England of Admiral Sir Chaloner Ogle, the president of the court-martial, Lieut. Frye brought an action against him in the Court of Common Pleas, for his illegal conduct at the trial, when the jury, under the direction of the Lord

[1] *Frye* v. *Ogle* (1743), McArthur on Courts-martial, 4th ed., i., 268; see also *Thompson, In re, R.* v. *Woodward* (1889), 5 T. L. R. 565, 601.

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Chief Justice Willes, gave a verdict for the plaintiff with £1,000 damages. The Chief Justice at the same time informed Lieutenant Frye that he might have an action against all or any of the other members of his court-martial;[1] and Lieutenant Frye accordingly issued writs against Rear-Admiral Mayne and Captain Renton, upon whom the same were served as they were coming ashore at the conclusion of the proceedings of the day at another court-martial, of which they were members, for the trial of Vice-Admiral Lestock on a charge of misconduct in a naval engagement with the French fleet off Toulon, in the early part of the same year. This proceeding was deemed a great insult by the members of the sitting court-martial, who accordingly passed some resolutions or remonstrances in strong language, highly derogatory to the Chief Justice, and they forwarded them to the Lords of the Admiralty, by whom the affair was reported to the King. His Majesty, through the Duke of Newcastle, signified to the Admiralty "his great displeasure at the insult offered to the court-martial, by which the military discipline of the navy is so much affected, and the King highly disapproved of the behaviour of Lieutenant Frye on the occasion." The Lord Chief Justice, as soon as he heard of the resolutions of the court-martial, ordered every member of it to be taken into custody, and was proceeding to uphold the dignity of his court in a very decided manner, when the whole affair was terminated in November, 1746, by the members of the court-martial signing and sending to his lordship a very ample written apology for their conduct. On the reception of this paper in the Court of

[1] This dictum of the Chief Justice is not good law, for a judgment in an action against one of several joint tortfeasors is a bar to an action against the others for the same cause, although such judgment remains unsatisfied (*Brinsmead* v. *Harrison* (1872), L. R. 7 C. P. 547). The injured party can, however, sue all the wrongdoers together in the first instance, and if he only sues one, the court has power to make the others parties to the action.

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Common Pleas it was read aloud, and ordered to be registered among the records "as a memorial," said the Chief Justice, "to the present and future ages, that whoever set themselves above the law, will in the end find themselves mistaken." The proceedings and the apology were also published in the *London Gazette* of 15th November, 1746. The apology was as follows: "As nothing is more becoming a gentleman than to acknowledge himself to be in the wrong, so soon as he is sensible he is so, and to make satisfaction to any person he has injured, we, therefore, whose names are underwritten, being thoroughly convinced that we were entirely mistaken in the opinion we had conceived of Mr. Chief Justice Willes, think ourselves obliged in honour, as well as justice, to make him satisfaction as far as is in our power. And as the injury we did him was of a public nature, we do in this public manner declare that we are now satisfied that the reflections cast upon him in our resolutions of the 16th and 21st of May last, were unjust, unwarrantable, and without any foundation whatsoever; and we do ask pardon of his Lordship and of the Court of Common Pleas for the indignity offered both to him and the Court."

At a naval court-martial for the trial of Crawford, a midshipman of H.M.S. "Emerald," for contempt and disobedience of the orders of his superior officer, Captain Knell, the court inadvertently found Mr. Crawford guilty only of having been *disorderly when a prisoner at large*, which formed *no part of the offence of which he was accused;* and he was reprimanded accordingly. Mr. Crawford thereupon brought an action against the captain for damages; and, the learned judge who presided at the trial having made some severe animadversions on the illegality of the proceedings, the jury awarded heavy damages.[1]

[1] 2 McArthur on Courts-martial, 221, *n.*

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For an illegal arrest.

In *Moore* v. *Bastard*[1] it appeared that a sergeant-major, one of the witnesses before a court-martial, had committed perjury, and was supposed to have been suborned to do so by Colonel Moore, whereupon the president placed Colonel Moore under arrest, and for this arrest Colonel Moore brought an action for false imprisonment against Colonel Bastard, the president of the court-martial.

Lord C. J. Mansfield, in summing up, told the jury, that a court-martial has no power of imprisoning a witness except for impropriety of conduct, and that it had exceeded its powers, and arrested the plaintiff illegally; and the jury thereupon returned a verdict for the plaintiff, with £300 damages.

For excess of punishment.

So in an action tried before Perrott, B., at the Exeter Assizes, in 1763, which was brought against the officers of the Devon Militia, for inflicting 1,000 lashes on the plaintiff, in consequence of the sentence of a court-martial awarding that punishment upon a charge of mutiny, the only mutinous act being that the plaintiff had written to the colonel a letter, which was not communicated to any one else, telling him that the men of the regiment were discontented, the jury gave £500 or £600 damages,[2] and Heath, J., observed on this case, that it would follow that if the plaintiff had died under the lashes, all the members of the court-martial would have been liable to have been hanged.[3]

General conclusion.

The general conclusion to be drawn from these cases is, that members of a court-martial are liable at common law for arbitrary acts done without jurisdiction, as well as for transgressing the limits of their jurisdiction and awarding excess of punishment; but they are not liable for mere misapprehension, mistakes, or erroneous

[1] 2 McArthur, 195, and (1806), 4 Taunt. 69.
[2] Cited by Heath, J., in *Warden* v. *Bailey* (1811), 4 Taunt. 70.
[3] 4 Taunt. 77.

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conclusions, whilst acting *bonâ fide* in the exercise of their official duty.[1]

No action against a judge for error of judgment.

In like manner the judge of an inferior court of record is not liable at common law in an action, *for an erroneous judgment*, but *he is answerable* in an action, *for an act done by his command and authority, when he has no jurisdiction.*[2]

The censure of a court-martial not actionable.

No action of libel will lie against members of a court-martial for reports appended to their sentence, containing a censure on any of the officers concerned. This question was determined in *Jekyll* v. *Moore.*[3]

Captain Jekyll, of the 43rd Regiment, had preferred certain charges against Colonel Stewart, which were tried by a general court-martial, presided over by Sir John Moore. The court most fully and most honourably acquitted Colonel Stewart, and added the following remarks to their finding: "The court cannot pass without observation the malicious and groundless accusations that have been produced by Captain Jekyll against an officer whose character has during a long period of service been so irreproachable as Colonel Stewart's, and the court do unanimously declare that the conduct of Captain Jekyll, in endeavouring to falsely calumniate the character of his commanding officer, is most highly injurious to the service." Captain Jekyll contended that the foregoing passage formed no part of the matter submitted to the judgment of the court, and was therefore a libel on him. He accordingly brought his action upon these words against Sir John Moore; but the Court of Common Pleas was of opinion, that no such action could be maintained, and Sir James Mansfield, C. J., observed, that "in order to enable the court-martial to decide upon the charges submitted by the

[1] *Per* Lord Mansfield, in *Wall* v. *McNamara* (1779), 1 T. R. 536.
[2] *Houlden* v. *Smith* (1850), 14 Q. B. D. 852.
[3] (1806), 2 Bos. & P. (N. R.) 341.

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King, they must hear all the evidence as well on the part of the prosecution as of the defence, and after hearing both sides declare their opinion whether there be any ground for the charges. If it appear that the charges are absolutely without foundation, is the president of the court-martial to remain perfectly silent on the conduct of the prosecution, or can it be any offence for him to state that the charge is groundless and malicious? It seems to me that the words complained of in this case form part of the judgment of acquittal, and consequently no action can be maintained upon it."

Report of court of inquiry a privileged communication.

Thus, where the commander-in-chief directed a military court of inquiry to be held, to investigate the conduct of Lieut.-Col. Home, who afterwards sued the president of such court for a libel contained in his report transmitted to the commander-in-chief, in that it stated among other matters, "that the conduct of Lieut.-Col. Home does not appear to have been actuated by those high and delicate feelings of honour which in all transactions of life ought to influence an officer of his high rank and reputation," it was held, that such a report was a privileged communication, and properly rejected as evidence at the trial.[1]

5. *Actions against Officers for Acts done when on Duty.*

There are numerous instances, in which actions have been brought against officers for wrongful acts, either done without authority, or in excess or abuse of authority, in the course of their official duties. The locality in which the alleged wrong has been committed is immaterial, as the liability of the defendant to be sued depends on his being a subject of the King.[2] The question in

[1] *Home* v. *Bentinck* (1820), 2 B. & B. 162.

[2] *Mostyn* v. *Fabrigas* (1773), 20 How. St. Tr. 81; *Duke of Brunswick* v. *King of Hanover* (1844), 6 Beav. 1; 1 Smith's Lead. Cas., 11th ed., 591, 644.

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all such cases is, whether the act complained of be within the discretionary powers and authority, which attach to an officer as incident to his situation; if found to be within those limits, he is exempt.

In trying the legality of acts done by officers, every construction will be made in their favour, where their intentions shall appear on the evidence to have been upright, and their motives free from the imputation of cruelty, malice, or oppression.[1] It is no answer to such an action, that the transaction in question has been previously the subject of a court-martial;[2] but an officer is exempt from liability to be sued in respect of acts done in the execution of positive orders of a superior commanding officer:[3] as also for acts done by him in a hostile manner, in the name of the Government which he serves, provided those acts be either authorized by an actual command, or ratified by a subsequent approval of the Government; to such acts the maxim *Respondeat superior* seems to apply in its widest sense.[4]

For inflicting excess of punishment.

The principles on which a court of justice is to determine whether an illegal excess of punishment has been inflicted by an officer, are clearly laid down by Lord Mansfield in *Wall* v. *McNamara*.[5] That was an action brought by the plaintiff, as captain in the African corps, against the defendant, as Lieut.-Governor of Senegambia, for imprisoning him for nine months at Gambia in Africa. Governor McNamara justified the imprisonment under the Mutiny Act for disobedience of orders. At the trial it appeared that the imprisonment of Captain Wall, which at first was legal, namely, for leaving his post without leave from his superior officer, though in a bad state of health, was aggravated with many circum-

[1] *Per* Lord Mansfield, in *Wall* v. *McNamara* (1779), 1 T. R. 536.
[2] *Warden* v. *Bailey* (1811), 4 Taunt. 67.
[3] *Hodgkinson* v. *Finnie* (1857), 2 C. B. N. S. 415.
[4] *Buron* v. *Denman* (1848), 2 Exch. 167; 1 Smith's Lead. Cas. 566.
[5] (1779), 1 T. R. 536.

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stances of cruelty. Lord Mansfield, in summing up, said: "In trying the legality of acts done by military officers in the exercise of their duty, particularly beyond the seas, where cases may occur without the possibility of application for proper advice, great latitude ought to be allowed, and they ought not to suffer for a slip of form, if their intention appears by the evidence to have been upright; it is the same as when complaints are brought against inferior civil magistrates, such as justices of the peace, for acts done by them in the exercise of their civil duty; there the principal inquiry to be made, by a court of justice, is, how the heart stood? And if there appears to be nothing wrong there, great latitude will be allowed for misapprehension or mistake. But on the other hand, if the heart is wrong—if cruelty, malice, and oppression appear to have occasioned, or aggravated the imprisonment or other injury complained of—they shall not cover themselves with the thin veil of legal forms, nor escape, under the cover of a justification the most technically regular, from that punishment which it is your province and your duty to inflict on so scandalous an abuse of public trust. It is admitted that the plaintiff was to blame in leaving his post. But there was no enemy, no mutiny, no danger: his health was declining, and he trusted to the benevolence of the defendant to consider the circumstances under which he acted. But supposing it to have been the defendant's duty to call him to a military account for his misconduct, what apology is there for denying him the use of the common air in a sultry climate, and shutting him up in a gloomy prison, when there was no possibility of bringing him to a trial for several months, there not being a sufficient number of officers to form a court-martial? These circumstances, independent of the direct evidence of malice, as sworn to by one of the witnesses, are sufficient for you to presume a bad,

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malignant motive in the defendant, which would destroy his justification, had it even been within the powers delegated to the defendant by his commission." [1]

In cases of the kind now under consideration, it is quite immaterial whether the cause of action has arisen within the realm or beyond the seas; though this proposition was not finally established until the year 1774, when the case of *Fabrigas* v. *Mostyn* [2] was determined in the Court of King's Bench, and put an end to all further question or doubt upon the subject.[3] Lord Mansfield, in delivering the judgment of the court, emphatically laid down that actions of this description may be brought in England, though the matter arises in foreign parts.

For acts in themselves unlawful.

Where an act complained of is itself unlawful, *bona fides* or honesty of purpose is no excuse, as appears from two cases cited by Lord Mansfield in *Fabrigas* v. *Mostyn*.[4]

For discretionary acts of military authority.

But no civil action will lie against an officer for a discretionary exercise of military authority in the course of actual service in open war, unless his conduct has been first condemned by a court-martial. Questions as to the use or abuse of such authority are so essentially the subjects of military cognizance, that the sentence of a court-martial is considered the only safe guide to their solution. No action, therefore, will lie for merely bringing an officer to a court-martial, nor for the previous arrest or suspension in the course of military duty; such acts being clearly within the limits of a commander's authority.

For illegal exercise of authority.

Swinton v. *Molloy* [5] is a case in which there was an illegal exercise of authority without any improper motive on the part of the defendant. That was an action of false

[1] The jury found for the plaintiff, damages £1,000.
[2] Cowp. 161.
[3] 1 Smith's Lead. Cas., 11th ed., 592.
[4] Ibid. 613, 614.
[5] (1783), 1 T. R. 537.

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imprisonment brought by the plaintiff, as purser of the "Trident" man-of-war, against the defendant, who was his captain. Captain Molloy pleaded a justification for a supposed breach of duty. But it appeared in evidence that he had imprisoned Mr. Swinton for three days, without inquiring into the matter, and had then released him on hearing his defence. Lord Mansfield said, "that such conduct on the part of the defendant did not appear to have been a proper discharge of his duty, and therefore that his justification had failed him under the discipline of the navy. But suppose that Captain Molloy, instead of releasing the plaintiff on hearing his defence, had kept him confined till he came to England, and had then made a charge against him in order to justify himself, the same policy which suffered an action of false imprisonment for the incautious, though upright conduct of the defendant, would have supported an action on the case founded on cool deliberate malice and injustice, not covered by a pretence of discipline."

In the foregoing case no want of uprightness was attributed to Captain Molloy, but the decision rested wholly on the circumstance of his having committed an injustice, although without a corrupt intention, and merely through incaution.

The common defence of officers against actions of this nature is a justification of their conduct as agreeable to the discipline of the service, and contributory to the maintenance of that discipline. And there can be no doubt, that when the conduct brought into question is not an oppressive, malicious, or unreasonable exercise of power, and does not amount to an excess or abuse of authority, an action is wholly unsustainable. This will appear from the following case, in which, Midshipman Leonard, of H.M.S. "Saturn," having disobeyed an order of the First Lieutenant (Shields) to go to the mast-head, and there to remain for a certain time, by

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way of punishment, Lieutenant Shields ordered him to be forcibly hoisted to the mast-head by a party of seamen. For this proceeding Leonard brought an action in the Court of Common Pleas against Lieutenant Shields for an assault; but the usage of the service as to the mast-heading of midshipmen for minor offences having been proved, the Chief Justice, Lord Loughborough, before whom the action was tried, ruled that the custom of the service was a justification of the lieutenant; and the jury found a verdict for him accordingly.[1] "It may not be fit," said Baron Eyre, "that a subordinate officer should dispute the commands of his superior, if he were ordered to go to the mast-head; but if the superior were to order him thither, knowing that from some bodily infirmity it was impossible he should execute the order, and that he must infallibly break his neck in the attempt, and it were so to happen, the discipline of the navy would not protect that superior from being guilty of the crime of murder." . . . "And one may observe in general, that there is a wide difference between indulging to situation a latitude touching the *extent* of power, and touching the *abuse* of it. Cases may be put of situations so critical, that the power ought to be unbounded; but it is impossible to state a case where it is necessary that it should be abused; and it is the felicity of those who live under a free constitution of government, that it is equally impossible to state a case where it can be abused with impunity."[2]

For illegal arrest.

Hannaford v. *Hunn*[3] was of somewhat similar import. The plaintiff was the master, and the defendant the captain of the "Tweed" ship of war. Captain Hunn directed Mr. Hannaford to sign a set of orders which he had made for the management of the ship's crew. The

[1] 1 Prendergast, part ii., 377.
[2] 1 T. R. 503, 504.
[3] (1825), 2 C. & P. 148.

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master conceiving that some of them were at variance with the printed instructions for the regulation of the navy, did not feel justified in obeying the captain's directions without first remonstrating, which he did by letter to the captain; whereupon the master was arrested in the presence of the whole ship's company.

The action was for false imprisonment. The defendant pleaded, among other pleas, that he put the plaintiff under arrest for disobedience of his orders as his superior officer; for contempt to him personally; and for quarrelling with a certain superior officer, in order that he might be brought to trial by a court-martial. The sentence of the court-martial was not pleaded as an estoppel; and it appeared in evidence that the court-martial was of opinion that it could not decide, for reasons assigned, on the charges specified in the above pleas.

Abbott, C. J., held "that the questions for the jury were, whether the defendant did not put the plaintiff under arrest for the charges alleged in the pleas, and that the truth of those charges was to be inquired of by the jury." And, in summing up, he asked the jury "whether they were of opinion that the first arrest took place on the writing of the letter as to signing the orders, and whether the writing such letter was an act of disobedience?" The jury found that it was not, and returned a verdict for the plaintiff, damages £300.

For abuse of authority.

Grant v. *Shard*[1] was an instance of wanton abuse of authority. That was an action for an assault. The defendant was an officer as well as the plaintiff. The plaintiff was directed to give a military order; he sent two persons, and they failed. The defendant said, "What a stupid person you are!" and twice struck him; and although the circumstances occurred at Gibraltar, and in

[1] (1784), 4 Taunt. 85.

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the actual execution of military service, it was held that the action lay.

For excess of authority.

In *Warden* v. *Bailey*[1] it was held that an action of trespass lay for an inferior officer against his superior officer, who imprisoned him for disobedience of an order made under colour, but not within the scope of military authority, although the imprisonment was followed by a trial by court-martial. The case is most material as an instance of a court of law considering whether an order given by military authority is or is not within the scope of that authority, and as discountenancing the duty of absolute obedience in a soldier enunciated in *Sutton* v. *Johnstone*.

The observations of Mansfield, C. J., in this case show that litigation between officers on account of acts done in the course of their official duties is looked upon with no favour by courts of law, and is to be discouraged on every consideration of public policy. He says: "All disputes respecting the extent of military discipline are greatly to be deprecated, especially in time of war; they are of the worst consequence, and such as no good subject will wish to see discussed in a civil action: they ought only to be the subject of arrangement among military men."

Inter arma silent leges.

The courts will show the utmost latitude in considering the effect of orders issued in the heat of battle, where obedience, and instant obedience, is necessary. Thus it was said by the court, in *Barwis* v. *Keppel*,[2] "flagrante bello the common law has never interfered with the army; inter arma silent leges."

When an action for malicious prosecution will lie.

No action can be maintained against a superior officer for malicious prosecution before a court-martial unless the superior court should be of opinion that there was *want of probable cause* on the part of such officer in bringing the plaintiff to trial before the court-martial.

[1] (1811), 4 Taunt. 67.
[2] (1766), 2 Wils. 318.

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A commanding officer has of necessity a discretionary power to arrest, suspend, and bring before a court-martial, any person placed under his orders. But this power may be so oppressively or improperly used as to constitute a distinct offence cognizable by a court-martial; and if the commander's proceedings are condemned by the military tribunal, then, and not otherwise, an action for a malicious prosecution seems to be maintainable against him, civil courts being incapable of appreciating with sufficient delicacy the circumstances which attend the exercise of military power, or of accurately discriminating the grounds and reasons of its application, without previous aid from the judgment of a court-martial. The mere fact of an acquittal by the court-martial is not sufficient proof of *want of probable cause* for the prosecution. At the same time, such an acquittal is an essential preliminary to the action, for though the accuser may have been actuated by the most clear and undisguised malice, yet if he substantiates his original charge to the satisfaction of a court-martial, the accused has no *locus standi* in a civil court, even upon the fullest evidence of his prosecutor's malice, it being impossible to say that there was want of probable cause after a court-martial has adjudged that there was a positive cause. Innocence and uprightness of intention will, therefore, on the one hand, be no defence to an action of this nature when there appears to have been a want of probable cause for the prosecution before the court-martial; while, on the other hand, the most malicious or even corrupt intention will not subject the accuser to a civil action when he substantiates the criminal charge before the military tribunal. Accordingly, a defence founded on the exercise of an unquestionable military power, in time of war and on actual service, was successfully used in the case of *Sutton* v. *Johnstone*,[1] which

[1] (1786), 1 T. R. 493.

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came repeatedly before the Courts at Westminster, and gave rise to very elaborate considerations of the whole question concerning the due exercise of a commander's authority under such circumstances. The circumstances of *Sutton* v. *Johnstone* were as follow: The plaintiff Sutton was captain of H.M.S. "Isis," which formed part of a squadron under the command of the defendant Johnstone. On the 16th April, 1781, there being war between the United States and the French on the one hand, and the English on the other, the defendant Johnstone ordered the ships under his command to pursue the French fleet, and signalled to Sutton to slip his cable in order to engage the enemy. Sutton having failed to slip his cable, the defendant Johnstone caused him to be brought to a court-martial on the ground of his having "delayed and discouraged the public service on which he was ordered," and for disobedience of orders in not slipping his cable and putting to sea. Sutton admitted on the trial by court-martial that he had disobeyed the orders, but averred that he did not wilfully and willingly disobey them, by reason that he was physically incapable of obeying them. The court-martial found that Sutton was justified in not immediately slipping his cable owing to the state in which the ship was, and that he did not delay the public service, and adjudged him to be honourably acquitted. Upon this Sutton brought an action against Johnstone for having maliciously and without probable cause charged him with the crime of disobedience of orders and the delay of the public service.

Practically, two important questions were raised in the case. First, whether an action for malicious prosecution would lie by a subordinate officer against his superior officer for an act in the course of discipline and under powers incident to his situation; secondly, whether, supposing such an action would lie, Johnstone had or

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had not probable cause for charging the plaintiff with disobedience of his orders, and delaying the public service, and therefore for bringing him to a court-martial. The case was twice tried before the Chief Baron, at Guildhall, and the plaintiff Sutton recovered £5,000 damages on the first trial and £6,000 on the second.

A motion was then made in the Court of Exchequer in arrest of judgment, but was discharged by that court.

Shortly afterwards Johnstone brought a writ of error in the Exchequer Chamber, and the judgment of the court below was reversed. Taking the second point first, whether there was or was not probable cause for bringing Sutton to a court-martial, the court (Lords Mansfield and Loughborough) stated: "Under all these circumstances, it being clear that the orders were given, heard, and understood, that in fact they were not obeyed, that by not being obeyed the enemy were enabled the better to sail off, that the defence was an impossibility to obey (a most complicated point)—under all these circumstances we have no difficulty to give our opinion that in law the commodore (Johnstone) had a probable cause to bring the plaintiff (Sutton) to a fair and impartial trial." The court further declared that "nothing less than a physical impossibility to obey could be a justification. A subordinate officer must not judge of the danger, propriety, expediency, or consequence of the order he receives; he must obey. Nothing can excuse him but a physical impossibility. A forlorn hope is devoted, many gallant officers have been devoted, fleets have been saved and victories obtained by ordering particular ships upon desperate services with almost a certainty of death or capture."

On the first point whether the action would lie, the court observed that it was not necessary to give judgment, because, supposing the action did lie, the court

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thought judgment ought to be given for the defendant. The court, however, was inclined to lean against the action lying, on the ground that a commander-in-chief has a discretionary power by the sea military code to put any man in the fleet upon his trial, that a court-martial alone can judge of the charge, that if the power of the commander-in-chief was abused, such an abuse was provided against by the 33rd Article of War, and that a commander who arrested, suspended, or put a man on his trial without probable cause might be tried by court-martial and punished accordingly.

The court said: "Commanders in a day of battle must act upon delicate suspicions, upon the evidence of their own eye; they must give desperate commands, they must require instantaneous obedience. In case of a general misbehaviour they may be forced to suspend several officers and put others in their places. A military tribunal is capable of feeling all these circumstances, and understanding that the first, second, and third part of a soldier is obedience; but what condition will a commander be in if upon the exercising of his authority he is liable to be tried by a common law judicature? If this action is admitted, every acquittal before a court-martial will produce one. Not knowing the law or the rules of evidence, no commander or superior officer will dare to act; their inferiors will insult and threaten them. The relaxation and decay of discipline in the fleet has been severely felt. Upon an unsuccessful battle there are mutual recriminations, mutual charges, and mutual trials; the whole fleet takes sides with great animosity, party prejudices mix. If every trial is to be followed by an action, it is easy to see how endless the confusion, how infinite the mischief will be. The person unjustly accused is not without his remedy; he has the properest amongst military men; reparation is done to him by an acquittal, and he who accused him unjustly is blasted

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for ever and dismissed the service." The judgment of the Court of Exchequer Chamber in favour of the Commodore was confirmed by the House of Lords. [1]

For malicious action.

Whether an action by a person subject to military or naval law will lie against an officer for an act within the limits of his authority, where the plaintiff avers and proves that the officer has acted maliciously and without probable cause, is a question on which judicial opinion has been divided. *Sutton* v. *Johnstone* cannot be taken as deciding more than that in that particular case there was probable cause (see *Warden* v. *Bailey* [2]), but Lords Mansfield and Loughborough plainly inclined to the view that such an action would not lie, though in *Warden* v. *Bailey* Justice Lawrence said that their reasoning was not approved by the House of Lords. In *Dawkins* v. *Paulet* [3] the view that the action does not lie was explicitly affirmed by Justices Mellor and Lush, with whom agreed Justice Hayes; while Chief Justice Cockburn as explicitly rejected it.

Memorial for redress of grievances not actionable.

No proceeding for libel can be maintained against any person belonging to the navy in respect of a memorial for redress of grievances (whatever imputations it may contain on the conduct of superior officers in the exercise of their duty),[4] provided it be laid before the proper superior authority.[5]

Reports to be made to Government only.

But an officer in the navy has no right to make communications upon subjects with which he becomes acquainted in his professional capacity, except to the Government. Thus, in *Harwood* v. *Green*, [6] where the plaintiff was the master of the "Jupiter" transport, and the defendant, a lieutenant in the navy, acting as

[1] 1 Bro. Parl. Cas. 76.
[2] (1811), 4 Taunt. 89.
[3] (1869), L. R. 5 Q. B. 94.
[4] See N. D. Act, s. 37.
[5] *R.* v. *Baillie* (1790), B. R., 30 Geo. 3; Holt's N. P. Rep. 312, *n.*
[6] (1827), 3 C. & P. 141.

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Government agent on board, wrote a letter to the secretary at Lloyd's, imputing to the plaintiff misconduct, and incapacity in the management of the ship, the defence was, that the letter was a privileged communication. But Lord Chief Justice Best was of opinion "that if the defendant, instead of writing to Lloyd's, had written to the navy board, then it would have been impossible to maintain any action against him, *unless it could be shown that his statements were false to his knowledge*. An officer of the navy is to make no communications but to his employers." [1]

It has already been stated on p. 279 that no action for libel will lie against members of a court-martial for reports appended to their sentence containing a censure on any of the officers concerned. Neither is the promulgation of a sentence in the *Gazette* by a competent official person to be deemed a libel on the officer named in the paper.[2] On the same principle when a delinquent, guilty of some enormity, has been brought to a court-martial, the commander-in-chief is not chargeable with libel, for directing the sentence to be read at the head of every regiment. [3]

No action for libel in respect of privileged communications.

In *Fairman* v. *Ivis* [4] a creditor of a half-pay officer sent a memorial to Lord Palmerston, then Secretary of State for War, including two bills of exchange drawn by the officer, detailing the circumstances of their non-payment, and requesting his lordship to direct the officer to satisfy the debt. The memorial also stated that the officer had concealed himself in order to avoid a just demand. On this the officer brought an action against his creditor for a libel; but at the trial Lord Tenterden told the jury that if they thought the memorial contained only a fair and

[1] On the law of libel. See *Hoare* v. *Silverlock* (1850), 9 C. B. 20; *Earl of Lucan* v. *Smith* (1856), 26 L. J. Ex. 94.
[2] *Oliver* v. *Bentinck* (1811), 3 Taunt. 455.
[3] Ibid. 459.
[4] (1822), 5 B. & Ald. 642.

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honest statement of facts, according to the understanding of the party who sent it, they ought to find a verdict for the defendant. The jury did so; and on an application to the Court of King's Bench for a new trial, their lordships held that under the circumstances of the case the publication of the memorial by transmission to the Secretary for War was no libel; it being a communication to an official person having authority to deal with the subject-matter of the complaint and to give redress thereon. But where a communication to the prejudice of an officer in his professional character is not strictly official, the privilege ceases, and there is no defence against an action for libel.

The principles of law as previously illustrated have received a remarkable confirmation in the highest courts of appeal.

In *Dawkins* v. *Lord F. Paulet*,[1] the plaintiff, a captain in the Coldstream Guards, and a lieutenant-colonel in the army, having written a letter to the adjutant-general complaining of an order given by the defendant as major-general commanding the brigade of Foot Guards, sent such letter conformably to military regulations to the defendant, to be forwarded by him to the adjutant-general. The defendant in transmitting this letter accompanied it with a report on the order complained of, in which he reflected on the character and capacity of the plaintiff as an officer, represented him as incompetent in the field, and unfit to conduct the business of a battalion in barracks, and requested that his conduct might be referred to a court of inquiry for investigation, inasmuch as an officer who had shown such want of judgment, tact, and temper was not fit to be entrusted with the responsibility and charge of a command. The court held that no action would lie against a military officer

[1] (1869), L. R. 5 Q. B. 94.

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for an act done in the ordinary course of his duty as such officer, even if done maliciously and without reasonable or probable cause; that if the plaintiff had suffered any wrong it was his duty to have adopted the remedy provided by the Articles of War with reference to the matters whereof he complained, and that he had no remedy at law in respect thereof.

Statements before courts of inquiry are privileged.

In *Dawkins* v. *Lord Rokeby*,[1] Colonel Dawkins, the same plaintiff as in the case just cited, brought an action for libel against the defendant, his superior officer, a general in the army, for having made statements in evidence (when called before a court of inquiry assembled under the order of the commander-in-chief to inquire into the conduct of the plaintiff), and after the close of his evidence, for having handed in a written paper (not called for by the court, but having reference to the subject of the inquiry), in which he alleged that the plaintiff was habitually insubordinate, and as an officer unfit for command. The plaintiff averred that these statements were untrue and malicious, and constituted the libel in question. It was unanimously held by the House of Lords that evidence of their falsehood and malice was immaterial and irrelevant, and that, being statements made by a military man bound to appear and give testimony before a court of inquiry in relation to the conduct of a military officer, and with reference to the subject of that inquiry, they were privileged. It is settled law founded on principles of public policy, for the protection of witnesses in judicial proceedings, that no action will lie against a witness for what he says or writes when giving evidence before a court of justice.

6. *Injuries to Property.*

Capturing merchantmen.

Injury to property may result from the exercise of military authority, either during war or peace. Naval

[1] (1873), L. R. 8 Q. B. 255, and 7 H. L. 744.

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officers are responsible in damages for improperly capturing merchantmen in time of war, on suspicion of their being lawful prize. Before the fruits of the prize can in any case be enjoyed by the captors, the vessel must be brought to adjudication and condemned by Court of Admiralty as lawful prize. The captors must prove the justice of the capture according to the laws of war; and on such proof the vessel is at once condemned. But if the proof fails, the court decrees restitution of the prize to the owners, and by the *same decree* awards damages against the captors, as compensation to the owners and the master and crew of the restored ship for their wrongful imprisonment or detention. This is the settled course of proceeding. But when the prize has been destroyed or lost through the instrumentality of the captors, the court decrees restitution in *value*, as the only remaining method of compensation for an illegal capture.

Illegal capture *bonâ fide.*

Again, where an officer acting within the scope of his commission and instructions makes a capture while in honest and unavoidable ignorance of facts and circumstances which render it illegal, he is not responsible in damages to the aggrieved party. Thus, for instance, where intelligence of a treaty of peace has not reached the cruising ground of a frigate, her commander is not answerable for captures made by him subsequently to the conclusion of the treaty, but before he is apprised of it. If the Admiralty issue an express order for the capture of a particular ship, such order will justify the seizure, so far at least as to indemnify the captor from costs and damages.[1] Captors having a *bonâ fide* possession, and using due care, are not responsible for losses occasioned by mere misfortune.[2]

Redress being thus effectually obtainable in the Court of Admiralty for illegal captures and seizures, and for

[1] Prendergast's "Law relating to Officers of the Navy," 407—412.
[2] *The John* (1818), 2 Dods. Adm. R. 336.

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the wrongful imprisonment or detention of the crews of vessels restored by that court to the owners, the courts of common law will not entertain any action against a naval officer with reference to these matters. Nor will an action lie against a naval officer in a court of law for the seizure and detention of a prize, even though he should afterwards dismiss the vessel without attempting to procure her condemnation by a Court of Admiralty; and although the grounds of detention were such as would not be causes of forfeiture, unless the vessel were British.

Acts done by order of Government.

If, however, the British Government have expressly instructed the officer to commit the act which constitutes the grievance, the matter becomes an affair of State, which is not cognizable by the courts of law, and must be adjusted by diplomatic arrangement between the two Governments concerned.

Consequences of negligence.

Negligence or unskilfulness in the exercise of an officer's duty may also be a cause of action for damages in respect of private injuries thus occasioned. But where in time of war a naval commander, through misapprehension of the maritime law and of his own powers, unintentionally misleads individuals who apply to him officially for guidance or direction, this is not a case of culpable negligence, and he is not responsible in damages for such an error, or its consequences.[1]

Responsibility for acts of subordinates.

The rule is, officers of both services are not liable for the acts of their subordinates, and the actual wrongdoer alone is liable for the damages or injury resulting from his conduct; and the wrongdoer is he who issued the order, or otherwise gave direction which occasioned the act or omission, and which led to the mischief. The leading case on this subject is *Nicholson* v. *Mouncey & Symes*.[2]

[1] *Courier* (1810), Edwards' Adm. Rep. 249.
[2] (1812), 15 East, 383; Prendergast, 432.

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7. *Impressment.*

Wrongful impressment.

Wrongful impressments into the sea-service fall likewise under the head of private injuries for which damages are recoverable in a court of law.

Impressment is the name given to the exercise of the authority of the State to press or compel the service of the subject for the defence of the realm. Every sovereign State must claim and at times exercise this power. Complaints were made by the parliament of the oppressive use of this power as early as the reign of Edward III., but it continued to be exercised. A small sum called imprest-money, or coat and conduct money, was given to the men when pressed, to enable them to reach the appointed rendezvous. Soldiers were secured in this way by Queen Elizabeth, by Charles I., and by the parliament itself in the Civil War. The famous new model army of Cromwell was largely raised by impressment. Parliament ordered the county committees to select recruits of "years meet for their employment and well clothed." After the Revolution of 1688, parliament occasionally made use of this resource. In 1779 a general press of all rogues and vagabonds in London to be drafted into the regiments was ordered. It is said that all who were not too lame to run away or too destitute to bribe the parish constable were swept into the net. As they were encouraged to desert by the undisguised connivance of the officers and men who were disgusted with their company, no further attempt to use the press for the army was made. Impressment for the army was declared illegal in 1640.[1] Impressment of carriages, drivers, animals, vessels and victuals was part of the Crown prerogative of purveyance. The prerogative was abolished in 1660,[2] and the present powers as to

[1] 16 Chas. 1, c. 28.
[2] 12 Chas. 2, c. 24, s. 11.

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such impressment depend upon the Army Act as annually renewed.[1]

A distinction between the liability of sailors and of other men dates from the sixteenth century. From an Act of Philip and Mary,[2] it appears that the watermen of the Thames claimed exemption from the press as a privileged body. They were declared liable, and the liability was clearly meant to extend to service as a soldier on shore. In the fifth year of Queen Elizabeth [3] an Act was passed to define the liability of sailors. It is known as "An Act touching politick considerations for the maintenance of the Navy." By its terms all fishermen and mariners were protected from being compelled "to serve as any soldiers upon the land or upon the sea, otherwise than as a mariner, except it shall be to serve under any captain of some ship or vessel, for landing to do some special exploit which mariners have been used to do."

The rogue and the vagabond element were at the mercy of the justices of the peace. The frightful epidemics of fever which desolated the navy till late in the eighteenth century were largely due to the infection brought by the prisoners drafted from the ill-kept jails at the time. As service in the fleet was most unpopular with the sailors, the press could only be enforced by employing troops. There was, however, one way of procuring them which gave them no chance of evasion. The merchant ships were stopped at sea and the sailors taken out. This was done to a great extent, more especially in the case of homeward-bound vessels. The press and the jails failed to supply the number of men required. In 1795 it was found necessary to impose on the counties the obligation to provide "a quota" of men at their own expense. The local authorities provided the recruits by offering high bounties, often to debtors confined in the

[1] 44 & 45 Vict. c. 58, ss. 112—121.
[2] 2 & 3 Ph. & M. c. 16, s. 8, repealed 7 & 8 Geo. 4, c. lxxv., s. 1.
[3] 5 Eliz. c. 5. ss. 41, 43, repealed 31 & 32 Vict. c. 45, s. 71.

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prisons. These desperate men were a very bad element in the navy. If it was natural that where pirates were, numerous wreckers also should abound; it was no matter for wonder that men who were converted into sailors against their will by press-gangs should have had no scruple in becoming pirates when they found the opportunity. It would be difficult to over-estimate the evil which must have been done by forcing industrious labourers, artisans and tradesmen, to serve on board a man-of-war, and turning them adrift as soon as the ship was out of commission. The methods of the press-gang were to send an armed party of reliable men, commanded by officers, who usually proceeded to such houses in the seaport towns as were supposed to be the resort of the seafaring population, laid violent hands on all eligible men, and conveyed them forcibly to the ships of war in the harbour. As it was not in the nature of sailors to yield without a struggle, many terrible fights took place between the press-gangs and their intended victims.

In recent times, when volunteers fail, a system of bounties has been resorted to; and it is not very probable that recourse will be again had to impressment. At the same time, the laws sanctioning it slumber, without being repealed. After the conclusion of the Napoleonic wars in 1815, the power of the press-gang was not again exercised.

Who liable to impressment.

The liability to impressment falls only on seafaring men and persons whose occupation and calling it is to work in boats on rivers.[1] Any waterman, bargeman, or lighterman may therefore be impressed except a salt-water ferryman.[2] And the possession of freehold was no ground of exemption if the freeholder was a seafaring man.[3] It applies not merely to seamen in the strict sense, but to sea-going ships' carpenters, &c.[4]

[1] *R.* v. *Tubbs* (1776), 2 Cowp. 512.
[2] *Ex parte Fox* (1793), 5 T. R. 276; *Ex parte Young* (1808), 9 East, 466.
[3] *R.* v. *Douglas* (1804), 5 East, 477.
[4] *Ex parte Boggin* (1811), 13 East, 549.

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Who exempt from impressment.

Except as to salt-water ferrymen, all the exemptions from liability rested on statute. The following exemptions still exist: (1) Persons using the sea for two years from first going to sea;[1] (2) Persons bound apprentices to the sea service for three years from the binding;[2] (3) Persons who have served in the Royal Navy for five years, while a proclamation calling for seafaring men is in force, are exempt for one year if discharged on their own application, or for two years if discharged by the Admiralty.[3] The Admiralty on application must grant written protections to persons exempted by the Act of 1739 or 1835,[4] and may grant protection in other cases.

Impressment, how effected.

Impressment is effected under warrants issued by the Admiralty, after a proclamation or Order in Council for impressment has been issued to an officer of the navy. This officer, or his deputy, with the warrant and a press-gang, seize the seafaring men desired. In case of illegality, malice, or irregularity, resistance even to killing is justifiable.[5] A person impressed into the sea service without colour of legal authority is entitled to release by *habeas corpus*, not under the Act of 1679,[6] but at common law, or under the Act of 1816.[7] Not only is a naval officer liable to damages in an action at the suit of private individuals for a wrongful impressment, but when it appeared that the captain of a man-of-war had exceeded his powers and acted maliciously, in impressing the master of a merchantman to serve as a common seaman, the Court of King's Bench, in 1747, ordered a criminal information to be filed against him, that he

[1] 13 Geo. 2, c. 17, s. 2.
[2] Ibid.; see *Softley's case* (1801), 1 East, 466.
[3] 5 & 6 Will. 4, c. 24, s. 2.
[4] 13 Geo. 2, c. 17, s. 2; 5 & 6 Will. 4, c. 24, s. 2.
[5] *R.* v. *Broadfoot* (1743), Fost. Crim. Law, 154; *R.* v. *Webb* (1788), 1 W. Bl. 19; *R.* v. *Borthwick* (1778), 1 Doug. 197; *R.* v. *Phillips* (1778), 2 Cowp. 830.
[6] 31 Chas. 2, c. 2.
[7] 56 Geo. 3, c. 100; Wilmot, "Opinions," 105; *Goldswaine's case* (1778), 2 W. Bl. 1207; *Chalacombe's case* (1810), 13 East, 550, *n.*

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might be tried at the suit of the Crown for a gross misdemeanor, and subjected to fine and imprisonment.[1]

8. *Liability to Criminal Proceedings.*

For acts done without jurisdiction.

Where the death of a person is caused by some act of a military or naval officer done without jurisdiction, the officer is criminally responsible. In the well-known case of Governor Wall (plaintiff in the action of *Wall* v. *McNamara*, already noticed) the penalty of death was actually inflicted on Governor Wall for a crime somewhat similar in nature and circumstances to the conduct towards himself in respect of which he recovered damages. This crime was the murder of Sergeant Benjamin Armstrong, of the African Corps, in 1782, by inflicting on him 800 lashes with such cruelty as to cause his death. Governor Wall appears to have been arrested on the charge shortly after his return to England, but to have absconded, and kept out of the way for nearly twenty years, as he was not tried till 1802. The circumstances out of which the charge arose were as follow: In July, 1782, Mr. Wall was in command of the garrison at Goree, an island on the coast of Africa, and about to leave for home. The men of the garrison had some pecuniary compensation then due to them in respect of their having been put on a reduced allowance of provisions, and the paymaster responsible for meeting their demands was to leave together with Governor Wall. On the day before that fixed for their departure, a number of men, headed by Armstrong, twice proceeded to the house of the paymaster to obtain a settlement of their accounts. According to the evidence for the prosecution, there was no appearance of any mutiny, and no disrespectful or disorderly conduct on the part of the men, who returned to barracks when ordered to do so by

[1] *R.* v. *Webb* (1740), 1 W. Bl. 19.

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Governor Wall. In the afternoon Governor Wall ordered a parade, and by his order 800 lashes were inflicted on Armstrong by black men, not with the ordinary cat, but with a description of rope. It was stated that Governor Wall stood by urging the black men to increased severity with coarse expressions, such as, "Lay on, you black ———, or I'll lay on you; cut him to the heart." Armstrong died shortly afterwards in hospital. For the defence some evidence was given that the behaviour of the men, and in particular of Armstrong, had been mutinous, and that a sort of drum-head court-martial had been held which ordered the punishment; and that the death of Armstrong was accelerated by drinking spirits in hospital. Chief Baron Macdonald directed the jury that if there was no mutiny and no court-martial, and the punishment of 800 lashes with such an unusual instrument was ordered by the prisoner, there was certainly ground to infer malice; and pointed out that Governor Wall in his report of the state of the settlement on his return made no mention of the existence of any mutinous spirit in the garrison. The jury, after deliberating for half an hour, found the prisoner guilty, and he was hanged at Tyburn.[1]

For errors of judgment.

A mistaken impression of duty will not excuse an officer, if he, without being justified by other circumstances, orders his men to fire, and some one is thereby killed. In 1807 Ensign Maxwell, of the Lanarkshire Militia, was tried before the High Court of Justiciary, in Scotland, for the murder of Cottier, a French prisoner of war, at Greenlaw, by improperly ordering a sentinel to fire into the room where Cottier and other prisoners were confined. Ensign Maxwell had the military charge of over 300 prisoners, confined in a building of no great strength. The prisoners were of a turbulent character, and to prevent their escape an order was given that all

[1] (1802), 28 How. St. Tr. 51.

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lights in the prison should be put out at nine o'clock, and that if this was not done at the second call the guard was to fire upon the prisoners, who were often warned of this order. Ensign Maxwell, having observed one night, on which there had been some disorder among the prisoners, a light burning beyond the appointed hour, twice ordered it to be put out, and, not being obeyed, directed the sentry to fire, but the musket merely snapped. Ensign Maxwell repeated the order; the sentry fired again, and Cottier received his mortal wound. At this time there was no symptom of disorder in the prison, and the prisoners were all in bed. The general instructions issued from the adjutant-general's office for the conduct of the troops guarding the prison contained no such order as that upon which Ensign Maxwell had acted; and it appeared to be a mere verbal one which had from time to time, in the hearing of the officers, been repeated by the corporal to the sentries on mounting guard, and had never been countermanded by those officers, who were also senior to Ensign Maxwell. The Lord Justice Clerk laid it down that Ensign Maxwell could only defend himself by proving specific orders, which he was bound to obey without discretion, and which called upon him to do what he did; and the jury found him guilty of the minor offence of culpable homicide, with a recommendation to mercy. He was sentenced to nine months' imprisonment.[1]

Again in the case of *R.* v. *Thomas*,[2] the prisoner, a sentinel on board H.M.S. "Achille," had been ordered to keep off all boats unless they had officers in uniform in them, or unless the officers on deck allowed them to approach; and he received a musket, three blank cartridges, and three ball cartridges. The boats pressed, upon which he repeatedly called to them to keep off; but

[1] Buchanan's "Remarkable Cases," Part II., 3.
[2] (1816), Bacon's Abridgment, tit. "Murder."

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one of them persisted and came close under the ship, and he then fired at a man in the boat and killed him. It was put to the jury to find whether the sentinel did not fire under the mistaken impression that it was his duty, and they found that he did. But the case being reserved for the opinion of the judges, their Lordships were unanimous that it was murder. They thought it, however, a proper case for a pardon; and further, they were of opinion that if the act had been necessary for the preservation of the ship, as if the deceased had been stirring up a mutiny, the sentinel would have been justified.

Offences committed in colonies, &c.

With respect to criminal liability for oppression and similar offences committed out of the realm, it was enacted by 11 Will. III., c. 12, that any governor or commander-in-chief of any colony beyond the seas guilty of oppression to any of his Majesty's subjects, or of any other crime within their respective governments or commands, might be tried and punished by the Court of King's Bench in England or by special commissioners. And the statute 42 Geo. III., c. 85, makes a similar provision for the trial and punishment of persons employed in the public service out of Great Britain in any similar military office or capacity.[1]

Use of naval forces to suppress riots.

Suppression or Prevention of Riot.—Although it is seldom that the naval forces of the Crown are called upon to act against a mob in the United Kingdom, yet it is very important that officers should be acquainted with the regulations and the law as to assisting the civil authorities to quell tumults on shore, and the legal liabilities they incur in the discharge of this duty. Cases occurring abroad are usually confined to the protection of British Consulates or British property, and are of a defensive nature, not presenting the same

[1] See *General Picton's case* (1804—1812), 30 How. St. Tr. 226, 955, *n.*

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difficulties of discrimination as are presented by the offensive action which may be needed to quell riots, &c. Article 474 of the Admiralty Instructions, 1906, lays down the following instructions to be observed by his Majesty's navy when aiding the civil power within the United Kingdom :—

(*a*) The landing of a naval force for the express purpose of aiding the civil power is never to be resorted to except in cases of emergency, when in the opinion of the magistrates no other sufficient means are available to quell civil tumults on shore.

(*b*) The party landed is to be employed only on the requisition of the civil authority, and the officer in command is to act in aid of, and in subordination to, the civil authority.

(*c*) The officer in command of the party landed should not use force unless called upon to do so by the magistrate present, and even then he must exercise his own judgment as to whether force is really necessary, and as to the mode and degree of force to be used. He should not order the men to fire unless the use of firearms is plainly necessary; and generally he should bear in mind that it is his duty to use no more force than is necessary, and to discontinue its use altogether the moment he can safely do so.

(*d*) The officer in command is alone to give the order to fire, but he shall give no such order until he has consulted with the magistrate who accompanies the force as to the urgent necessity of firing on the rioters, and has been commanded by him to disperse them by force.

(*e*) Full and distinct warning must be given to the rioters that the party is about to fire, and that the fire will be effectual. The officer in command, and the magistrate who accompanies the force, shall consult together as to the best practicable means of giving such warning.

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(*f*) Every possible care should be taken that innocent persons may not suffer from the fire.

(*g*) The above directions, to act under the orders and by the authority of and after consulting the magistrate, are to apply to all cases except those of special emergency where, in order to secure the safety of the force employed, it becomes indispensably necessary to take immediate action, and where such action cannot safely be deferred until the order or authority of the magistrate has been obtained, or consultation with him has taken place.

(*h*) It is undesirable that firing should take place over the heads of rioters, or that blank cartridge should be used.

2. It will generally be advisable that the party should be divided into four sections, two sections to have their arms always loaded, and every precaution should be taken, according to circumstances, to guard the party from being surprised or overpowered by the rioters.

3. Officers are to understand that while a close adherence to the sub-clauses (*a*) to (*g*) is imperative it is not intended to be so with regard to sub-clause (*h*), liberty being left to them to use their own discretion or to give discretionary orders to the officers under them in regard to making such modifications as may be deemed expedient.

Definition of unlawful assembly.

"There is no doubt," said Baron Alderson in *R.* v. *Vincent*,[1] "that the people of this country have a perfect right to meet for the purpose of stating what are, or even what they consider to be, their grievances. That right they always have had, and I trust always will have; but in order to transmit that right unimpaired to posterity, it is necessary that it should be regulated by law and restrained by reason." An unlawful assembly, then, is any meeting whatsoever of great numbers of people with such cir-

[1] (1839), 9 C. & P. 95.

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cumstances of terror as cannot but endanger the public peace and raise fears and jealousies among the King's subjects, as where great numbers complaining of a common grievance meet together, armed in a warlike manner, in order to consult together concerning the most proper means for the redressing of their grievances.[1] If the assembly is for a lawful purpose and with no intention of carrying out that purpose in an unlawful manner, the assembly is not an unlawful one, even though the persons assembling know that the assembly is likely to be resisted by others.[2]

Definition of "riot."

A riot is a tumultuous disturbance of the peace by three or more persons assembling together of their own authority with an intent mutually to assist one another against any who oppose them in the execution of some enterprise *of a private nature, and afterwards actually executing the same* in a violent and turbulent manner to the terror of the people. It is immaterial whether the act done be lawful or not, but there must be some act.[3] Doing the act in a manner calculated to inspire people with terror is punishable, whether it be lawful or unlawful; but where the object of the assembly is lawful, it requires far stronger evidence of the terror caused by the means used to induce a jury to return a verdict of guilty, than if the object were unlawful.

"A riot," says Mr. Justice Gaselee,[4] "is not the less a riot, nor an illegal meeting the less an illegal meeting, because the proclamation of the Riot Act has not been read; the effect of that proclamation being to make the parties guilty of a capital offence, if they do not disperse within an hour; but if that proclamation be not read, the

[1] Hawkins, bk. i., ch. lxv., s. 9; *R.* v. *Neale* (1839), 9 C. & P. 431.
[2] *Beatty* v. *Gillbanks* (1882), 9 Q. B. D. 308. See also *Wise* v. *Dunning*, [1902] 1 K. B. 167.
[3] Hawkins, bk. i., ch. lxv., s. 1; and see *R.* v. *Graham* (1886), 16 Cox, 422.
[4] *R.* v. *Fursey* (1833), 6 C. & P. 81.

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common law offence remains, and it is a misdemeanor; and all magistrates, constables, and even private individuals are justified in dispersing the offenders; and if they cannot otherwise succeed in doing so, they may use force."

Definition of "insurrection."

An insurrection differs from a riot in this—that a riot has in view some enterprise of a *private nature*, while an insurrection contemplates some enterprise of a *general and public nature*. An insurrection, in short, involves an intention to levy war against the King, as it is technically called, or otherwise to act in general defiance of the Government of the country. For example, a mob assembling to pull down or burn a building is engaged in a riot. If the object was to seize a store of arms with a view to arming themselves, and making war against the Government, they would be guilty of insurrection.[1]

Riot Act, 1715.

Sec. 1 of the Riot Act[2] enacts that, "If any persons, to the number of twelve or more, being unlawfully, riotously, and tumultuously assembled together, to the disturbance of the public peace . . . and being required or commanded by any . . . justice, . . . by proclamation to be made in the King's name, in the form hereinafter directed, to disperse themselves, and peacefully to depart . . . shall, to the number of twelve or more . . . unlawfully, riotously, and tumultuously remain or continue together for one hour after such command or request made by proclamation," they shall be adjudged felons, and shall be liable to penal servitude for life or not less than three years, or to imprisonment with or without hard labour, not exceeding two years. The justice is required to command silence among the rioters, or as near them as he can safely come, and then with a loud voice to make proclamation in the following words:—"Our Sovereign Lord the King chargeth and

[1] *R.* v. *Frost* (1839), 9 C. & P. 129.
[2] 1 Geo. 1, stat. 2, c. 5.

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commandeth all persons, being assembled, immediately to disperse themselves, and peacefully to depart to their habitations or to their lawful business, upon the pains contained in the Act made in the first year of King George the First, for preventing tumults and riotous assemblies. God save the King."

(In *R.* v. *Child*,[1] it was held that if the magistrate, when reading the proclamation, omit to read the words "God save the King" at the end of it, persons remaining together for an hour after the reading of the proclamation cannot be convicted under sec. 1 of the Act.)

Sec. 3 provides that if the persons so riotously and tumultuously assembled, or twelve or more of them, remain together for one hour after the proclamation, they may be seized and apprehended by any justice or person assisting him; and that if any of the persons so unlawfully assembled happen to be killed, maimed or hurt in the dispersing, seizing or apprehending or endeavouring to disperse, seize or apprehend them, by reason of their resisting, then the justices, constables and persons assisting such justices and constables shall be fully indemnified for any such killing, maiming or hurting.

Liability of soldier or sailor for unlawful killing or maiming.

The use of arms, and particularly firearms, on such emergencies, is obviously attended with loss of life or limb to private individuals; and for these consequences a military or naval officer may be called upon to stand at the bar of a criminal court. A private soldier also may occasionally be detached on special duty, with the necessity of exercising discretion as to the use of his arms; and in such cases he is responsible, like an officer, for the right use or exercise of such discretion. One of the earliest reported cases on this subject occurred in 1735, when Thomas Macadam, a private

[1] (1830), 4 C. & P. 442.

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soldier, and James Long, a corporal, were tried before the Admiralty Court of Scotland, upon a charge of murder under the following circumstances:—They were ordered to attend some custom-house officers, for their protection in making a legal seizure; and being in a boat with the custom-house officers in quest of the contraband goods, one Fraser and his companions came up with them, leaped into the boat and endeavoured to disarm the soldiers. In the scuffle, the prisoners stabbed Fraser with their bayonets, and threw him into the sea. For this homicide the prisoners were tried and convicted of murder by a jury, and they were sentenced to death. But the High Court of Justiciary reversed this judgment, on the ground that the homicide in question was necessary for securing the execution of the trust committed to the prisoners. The report of this case contains the following remarks upon it by Mr. Forbes, afterwards Lord President of the Court of Session of Scotland, and they appear to be of great importance to military and naval men:—

"Where a man has *by law* weapons put into his hands, to be employed not only in defence of his life when attacked, but in support of the execution of the laws, and in defence of the property of the Crown, and the liberty of any subject, he doubtless may use those weapons, not only when his own life is put so far in danger that he cannot probably escape without making use of them, but also when there is imminent danger that he may by violence be disabled to execute his trust without resorting to the use of those weapons; but when the life of the officer is exposed to no danger, when his duty does not necessarily call upon him for the execution of his trust, or for the preservation of the property of the Crown, or the preservation of the property or liberty of the subject, to make use of mortal weapons, which may destroy his Majesty's subjects, especially numbers of them who may be innocent, it is impossible from the resolution of the

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Court of Justiciary to expect any countenance to, or shelter for, the inhuman act." [1]

During the Irish insurrection of 1848, Smith O'Brien was arrested at the railway station of Thurles on a charge of high treason. A public passenger train was on the point of starting for Dublin, and the engineer was mounted on the engine, with the steam up and everything in readiness for the immediate prosecution of the journey. The scene of the arrest lay in the disturbed district, which was in the occupation of the troops employed to suppress the insurrection and prevent its extension. General Macdonald's aide-de-camp, having been apprised of the arrest, proceeded instantly to the station, and there commanded the engineer to dismount from the engine, and to stop the train, it being of the utmost importance to the public safety and service that the news of the arrest should not be carried along the line of railway, as the country people might assemble in great numbers and destroy the rails and rescue the prisoner, or otherwise impede the conveyance of the prisoner to Dublin. Such interference would obviously have occasioned great loss of life, besides the danger to the public service at such a season. The engineer at first refused to obey the aide-de-camp's orders, whereupon the officer presented his pistol at the engineer and threatened him with instant death if he persisted in his refusal. The man then dismounted; but it is conceived that the officer pursued a correct line of conduct, and exercised upon the occasion a sound discretion, which would have been a good legal defence to him, if he had ultimately proceeded to execute his threat upon the engineer.[2]

Right to quell riot without superior military orders.

The right of officers or soldiers to interfere in quelling a *felonious riot*, whether with or without superior military

[1] Maclaurin's "Arguments and Decisions," 80—84.
[2] Prendergast's "Law relating to Officers in the Army," 169.

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orders, or the direction of a civil magistrate, is quite clear and beyond the possibility of mistake. This subject, however, was formerly little understood, and military men failed in their public duty through excess of caution. It was imagined also that the Riot Act, in allowing an hour for rioters to disperse before the capital penalty for rioting was incurred, suspended the right of interference with a mob until the expiration of the hour so allowed. Chief Justice Mansfield, in *Burdett* v. *Abbott*,[1] said:—"In 1780 this mistake extended to an alarming degree. Soldiers with arms in their hands stood by and saw felonies committed, houses burnt and pulled down before their eyes, by persons whom they might lawfully have put to death if they could not otherwise prevent them, without interfering; some because they had no commanding officer to give them the command, and some because there was no justice of the peace with them. . . . If it is necessary for the purpose of preventing mischief, or for the execution of the law, it is not only the right of soldiers, but it is their duty, to exert themselves in assisting the execution of a legal process, or to prevent any crime or mischief being committed. It is therefore highly important that the mistake should be corrected which supposes that an Englishman, by taking upon him the additional character of a soldier, puts off any of the rights and duties of an Englishman."

In the celebrated trial of Brackley Kennett, Lord Mayor of London,[2] who was indicted and convicted for breach of duty in not promptly quelling the great riots of London in 1780 by ordering the troops to clear the streets, Lord Chief Justice Mansfield said:—"The common law and several statutes have invested justices of the peace with great powers to quell riots, because, if not

[1] (1812), 4 Taunt. 449.
[2] (1780), 2 Doug. 436, *n.* 4.

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suppressed, they tend to endanger the constitution of the country; and, as they may assemble all the King's subjects, it is clear they may call in the soldiers, who are subjects, and may act as such; but this should be done with great caution. It is well understood that magistrates may call in the military. It would be a strange doctrine if, in an insurrection rising to rebellion, every subject had not a power to act when he possesses the power in a case of a mere breach of the peace. By the Act of George I. (the Riot Act) a particular direction is given to every justice for his conduct; he is required to read the Act, and the consequences are explained. It is a step *in terrorem* and of gentleness, and is not made a necessary step, as he may instantly repel force by force. If the insurgents are not doing any act, the reading of the proclamation operates as notice. There never was a riot without bystanders, who go off on reading the Act."

Opinion of Attorney-General Wedderburn.

When George III. heard that the troops which had been marched in from all quarters to suppress the riots of 1780 were of no avail in restoring order on account of a scruple that they could not be ordered to fire till an hour after the Riot Act had been read, he called a Cabinet Council, at which he himself presided, and propounded for their consideration the legality of this opinion. The question was put to Wedderburn, the Attorney-General, who attended as assessor, and he gave a clear, unhesitating, and unqualified answer to the effect that if the mob were committing a felony, as by burning down dwelling-houses, and could not be prevented from doing so by other means, the military, according to the laws of England, might and ought to be ordered to fire upon them; the reading of the Riot Act being wholly unnecessary and nugatory under such circumstances.[1]

Further opinion of Wedderburn

This eminent lawyer having become Chief Justice of

[1] Lord Campbell's "Lives of the Chancellors," vi., 137.

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the Court of Common Pleas, with the title of Lord Loughborough, delivered a charge to the grand jury on the special commission for the trial of the rioters of 1780 in the following terms:[1]—"I take this public opportunity of mentioning a fatal mistake into which many persons have fallen. It has been imagined that because the law allows an hour for the dispersion of a mob to whom the Riot Act has been read by the magistrate the better to support the civil authority, that during that time the civil power and the magistracy are disarmed, and the King's subjects, whose duty it is at all times to suppress riots, are to remain quiet and passive. No such meaning was within view of the legislature, nor does the operation of the Act warrant such effect. The civil magistrates are left in possession of all those powers which the law had given them before. If the mob collectively, or a part of it, or any individual within or before the expiration of that hour attempts or begins to perpetrate an outrage amounting to felony, to pull down a house, or by any other act to violate the law, it is the duty of *all present*, of whatever description they may be, to endeavour to stop the mischief, and to apprehend the offender." as Lord Lough-borough.

After the suppression of the great riots of London in 1780, the Government was acrimoniously attacked both in and out of parliament on the ground that the employment of a military force to quell riots by firing on the people could only be justified, if at all, by martial law proclaimed under a special exercise of the Royal prerogative; and it was thence argued that the nation was living under martial law.[2] But Lord Mansfield, the Chief Justice of the King's Bench, addressed the House of Lords[3] on this subject and placed it in its true light: "I hold that his Majesty, in the orders he issued by the advice of his Opinion of Lord Chief Justice Mansfield.

[1] 21 St. Tr. 485.
[2] Lord Campbell's "Lives of the Chief Justices," ii. 527, 528.
[3] Parl. Hist. xxi. 688—698.

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ministers, acted perfectly and strictly according to the common law of the land, and the principles of the constitution. . . . Every individual in his private capacity may lawfully interfere to suppress a riot, much more to prevent acts of felony, treason and rebellion. Not only is he authorized to interfere for such a purpose, but it is his duty to do so; and, if called upon by a magistrate, he is punishable in case of refusal. What any single individual may lawfully do for the prevention of crime and preservation of the public peace, may be done by any number assembled to perform their duty as good citizens. It is the peculiar business of all constables to apprehend rioters, to endeavour to disperse all unlawful assemblies, and, in case of resistance, to attack, wound, nay, kill those who continue to resist, taking care not to commit unnecessary violence, or to abuse the power legally vested in them. Every one is justified in doing what is necessary for the faithful discharge of the duties annexed to his office, although he is doubly culpable if he wantonly commits an illegal act under the colour or pretext of law. The persons who assisted in the suppression of those tumults are to be considered mere private individuals acting as duty required. My lords, we have not been living under martial law, but under that law which it has long been my sacred function to administer. For any violation of that law the offenders are amenable to our ordinary courts of justice, and may be tried before a jury of their countrymen. . . . Consequently the idea is false that we are living under a military government, or that, since the commencement of the riots, any part of the laws or of the constitution has been suspended or dispensed with. I believe that much mischief has arisen from a misconception of the Riot Act, which enacts that after proclamation made persons present at a riotous assembly shall depart to their homes: those who remain there above an hour afterwards

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shall be guilty of felony and liable to suffer death. From this it has been imagined that the military cannot act, whatever crimes may be committed in their sight, till an hour after such proclamation has been made, or, as it is termed, 'the Riot Act is read.' But the Riot Act only introduces a new offence—remaining an hour after the proclamation—without qualifying any pre-existing law, or abridging the means which before existed for preventing or punishing crimes."

In *Clifford* v. *Brandon*,[1] Lord Chief Justice Mansfield said :—"If any person encourages, or promotes, or takes part in riots, whether by words, signs or gestures, or by wearing the badge or ensign of the rioters, he is himself to be considered a rioter, and he is liable to be arrested for a breach of the peace. In this case all are principals."

Requisition of military aid by the magistrate.

But notwithstanding the existence of a clear right and duty on the part of military men voluntarily to aid in the suppression of a riot, it would be the height of imprudence to intrude with military force except upon the requisition of a magistrate, unless in those cases where the civil power is obviously overcome, or on the point of being overcome, by the rioters.

The primary duty of preserving public order rests with the civil power. An officer, therefore, in all cases where it is practicable, should place himself under the orders of a magistrate. But the officer will neglect his duty who, from fear of responsibility, allows outrages to be committed which it is in his power to check, merely on the ground that there is no magistrate on the spot to give orders to the military. If the officer and magistrate are acting together, it is the duty of the magistrate to give orders to the officer when to take action, and an officer would incur considerable responsibility by firing without his orders, or refusing to fire in pursuance of his

[1] (1810), 2 Camp. 370.

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orders. Still a man is liable if he obeys an illegal order, and circumstances might arise which would justify the officer in firing or not firing, notwithstanding the magistrate might give orders to the contrary. The magistrate also, if he acts with discretion, will necessarily defer in military matters to the opinion of the officer, for if he were to give orders to fire upon rioters, although dissuaded by the officer accompanying him, he would have great difficulty in defending himself, in the event of death occurring, should he be indicted for manslaughter.[1]

With regard to the requisition of military aid by the civil magistrate, the rule seems to be, that when once the magistrate has charged the military officer with the duty of suppressing a riot, the execution of that duty is wholly confided to the judgment and skill of the military officer, who thenceforward acts independently of the magistrate until the service required is fully performed. The magistrate cannot dictate to the officer the mode of executing the duty: and an officer would desert his duty if he submitted to receive any such orders from the magistrate. Neither is it necessary for the magistrate to accompany the officer in the execution of his duty.

Opinion of Mr. Justice Littledale.

The learning on these points may be gathered from the charge of Mr. Justice Littledale to the jury, in the trial of the Mayor of Bristol for breach of duty in not suppressing the riots at that city in 1831. "Another charge," said his lordship, "against the defendant is, that upon being required to ride with Major Beckwith, he did not do so. In my opinion he was not bound to do so in point of law. I do not apprehend it to be the duty of a justice of the peace to ride along and charge with the military. A military officer may act without the authority of the magistrate, if he chooses to take the responsibility; but although that is the strict law, there

[1] See *R.* v. *Pinney* (1832), 5 C. & P. 273.

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are few military men who will take upon themselves so to do, except on the most pressing occasions. Where it is likely to be attended with a great destruction of life, a man, generally speaking, is unwilling to act without a magistrate's authority; but that authority need not be given by his presence. In this case the mayor did give his authority to act: the order has been read in evidence; and he was not bound in law to ride with the soldiers, more particularly on such an occasion as this, when his presence elsewhere might be required to give general directions. . . . I do not apprehend that it is any part of the duty of a person who has to give general directions, to expose himself to all kinds of personal danger. . . . A case may be conceived where it might be prudent, but here no necessity for it has been shown."[1]

Opinion of Lord Chief Justice Tindal.

This subject was also luminously expounded by Lord Chief Justice Tindal, in his charge to the grand jury on the special commission held at Bristol, on 2nd January, 1832, for the trial of the parties implicated in the formidable riots and devastations committed in that city during the autumn of the previous year: "In the first place, by the common law, every private person may lawfully endeavour of his own authority, and without any warrant or sanction of the magistrates, to suppress a riot by every means in his power. He may disperse, or assist in dispersing, those who are assembled; he may stay those who are engaged in it from executing their purpose; he may stop and prevent others whom he shall see coming up from joining the rest; and not only has he the authority, but it is his bounden duty, as a good subject of the King, to perform this to the utmost of his ability. If the riot be general and dangerous, he may arm himself against the evil-doers to keep the peace. Such was the opinion of all the judges of England in the

[1] (1832), 3 B. & Ad. 963.

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time of Queen Elizabeth in a case called 'The Case of Arms,'[1] although the judges add that 'it would be more discreet for everyone in such a case to attend and be assistant to the justices, sheriffs, or other ministers of the King in doing this.' It would, undoubtedly, be more advisable so to do; for the presence and authority of the magistrate would restrain the proceeding to such extremities, until the danger was sufficiently immediate, or until some felony was either committed or could not be prevented without recourse to arms; and at all events the assistance given by men who act in subordination to, and in concert with, the civil magistrates, will be more effectual to attain the object proposed than any efforts, however well intended, of separate and disunited individuals. But if the occasion demands immediate action, and no opportunity is given for procuring the advice and sanction of the magistrate, *it is the duty of every subject to act for himself, and upon his own responsibility*, in suppressing a riotous and tumultuous assembly; and he may be assured that whatever is honestly done by him in the execution of that object, will be supported and justified by the common law. And whilst I am stating the obligation imposed by the law on every subject of the realm, I wish to observe that the law acknowledges no distinction in this respect between the soldier and the private individual. The soldier is still a citizen, lying under the same obligation, and invested with the same authority to preserve the peace of the King as any other subject. If the one is bound to attend the call of the civil magistrate, so also is the other; if the one may interfere for that purpose when the occasion demands it, without the requisition of the magistrate, so may the other too; if the one may employ arms for that purpose, when arms are necessary,

[1] Popham, 121.

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the soldier may do the same. Undoubtedly the same exercise of discretion which requires the private subject to act in subordination to, and in aid of, the magistrate, rather than upon his own authority, before recourse is had to arms, ought to operate in a still stronger degree with a military force. But where the danger is pressing and immediate, where a felony has actually been committed, or cannot otherwise be prevented, and from the circumstances of the case no opportunity is offered of obtaining a requisition from the proper authorities, the military subjects of the King, like his civil subjects, not only may, but are bound to do their utmost, of their own authority, to prevent the perpetration of outrage, to put down riot and tumult, and to preserve the lives and property of the people." [1]

Result of authorities.

It is one result of the law, as laid down by the foregoing authorities, that a military officer refusing or failing, on a proper occasion, to bring into action against a riotous or an insurrectionary mob, the force under his command, would be guilty of an indictable offence at common law, and might be prosecuted accordingly for breach of duty, independently of his liability to military censure.

[1] (1832), 5 C. & P. 261, *n.* See also on the same subject a passage in the Life of Lord Chief Justice Holt, Lord Campbell's "Chief Justices," ii., 174.

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CHAPTER XV.

THE RULES OF EVIDENCE.

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INTRODUCTORY.

WITH a view to assist the proceedings of Courts of Justice in the investigation of facts submitted for their decision, general rules have been laid down respecting the admissibility and effect of evidence, and the order in which the several proofs are to be adduced. These

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rules constitute the Law of Evidence. In inquiries upon this subject, the great end and object ought always to be the ascertaining of the most convenient and surest means for the attainment of truth. The end sought is truth; and the rules laid down are the means used for the attainment of that end. Evidence in Law includes all the legal means, exclusive of mere argument, which tend to prove or disprove any fact, the truth of which is submitted to judicial investigation. It and the word *proof* are often used synonymously. Accurate logicians, however, apply the latter term rather to the *effect* of evidence than to evidence itself. That high degree of evidence which is called *demonstration* excludes all possibility of error, and mathematical truth alone is susceptible of it. Such evidence cannot be obtained in the investigation of matters of fact, of which the most that can ever be said is, that there is no reasonable doubt concerning them. In trials of fact, therefore, the true question is not whether it is possible that the testimony may be false, but whether there is sufficient probability of its truth; that is, whether the facts are proved by competent satisfactory evidence.[1] "The object of every criminal trial is, or may be, to determine two classes of questions—questions of fact and questions of law. If the accused person pleads guilty, there is no question of fact involved in the trial; but if he does not, he raises two questions or issues: first, whether the facts charged against him happened; and next, if they did happen, what is their legal consequence. In trial by jury these two questions are answered by different persons. The jury, under the guidance of the judge, find the facts. The judge lays down the law. In trials before courts-martial the members of the court both find the facts and lay down the law, and thus perform the functions of both judge and jury. It therefore becomes their duty,

[1] Taylor Ev. 10th ed., 1.

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when applying their minds to questions of fact in the capacity of jurymen, to consider themselves bound by the rules which, in the case of an ordinary trial by jury, are laid down by the judge." [1]

Both in judicial and non-judicial proceedings a person who wishes to find out whether a particular event did or did not happen tries, in the first place, to obtain information from persons who were present and saw what happened (direct evidence), and failing that, to obtain information from persons who can tell him about facts from which he can draw an inference as to whether the event did or did not happen (indirect evidence). But in judicial inquiries the information given must be on oath and be liable to be tested by cross-examination, and there are certain rules of law which exclude from the consideration of a jury particular classes of indirect evidence which an ordinary inquirer would naturally take into consideration. Statements so excluded are said to be "not admissible as evidence," or "not evidence."

The rules of evidence to be followed by courts-martial are those adopted in the courts of ordinary criminal jurisdiction in England. These rules are to be found in the ordinary text-books on the subject, such as Taylor on Evidence, Roscoe's Digest of the Law of Evidence in Criminal Cases, Stephen's Digest of the Law of Evidence, and Wills' Theory and Practice of the Law of Evidence.

Section I.

General Principles of the Law of Evidence.

General principles.

"Courts-martial have authority to try offenders and inflict punishment according to the nature and degree of the offence as regulated by the law of the land." [2]

[1] M. M. L., 55.
[2] *Per* Grose, J., *R.* v. *Suddis* (1801), 1 East, 315.

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Foundation of general rules of evidence.

The general rules of evidence are founded on unchangeable principles of justice, which can never vary with the forms and jurisdiction of courts; they must therefore govern the practice of courts-martial on all questions of testimony.

The means which the law employs for investigating the truth of a past transaction are those which are resorted to by mankind for similar, but non-judicial purposes. These are the best, usually the only, means of inquiry, and for this reason a court-martial forms a tribunal well qualified to judge of matters of fact, especially when they involve questions of professional conduct or breaches of discipline; for, subject to certain exceptions, the members must decide by the aid of experience and reason, as they would do on any non-judicial occasion.

Proof.

Where legal evidence is sufficient to produce a conviction of the truth of the fact to be established, it amounts to proof.

It is obvious that the means of indirect proof must usually be supplied by direct proof; for no inference can be drawn from any collateral facts until those facts have themselves been first satisfactorily established.[1]

Rules of exclusion.

Such being the ordinary sources of evidence, why should an inquiry as to the truth of any particular fact in a court of justice be limited by exclusive rules which restrain the admission of evidence?

The answer is, that the law interferes in order to provide more certain tests of truth than can be provided, or indeed than are necessary, in the ordinary course of affairs, and thereby to exclude all weaker evidence to which such tests are inapplicable, and which, if generally admitted, would be more likely to mislead than to answer the purposes of truth.[2]

Tests of truth.

The first of these tests is the obligation of *an oath* or

[1] 1 Starkie Ev. 14.
[2] Ibid. 15.

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solemn affirmation,[1] required by the law in order to exclude impure or suspicious testimony, and to add the most solemn and binding sanction to that which is admitted. The next is that of *cross-examination;* that is to say, the power given to the party against whom evidence is offered, of cross-examining the witness upon whose authority the evidence depends: this constitutes the strongest test both of the ability and the willingness of the witness to declare the truth. By this means the opportunity which the witness had of ascertaining the fact to which he testifies, his ability to acquire the requisite knowledge, his powers of memory, his situation with respect to the parties, his motives, are all severally examined and closely scrutinized.[2]

Testimony of foreigners.

"The testimony of foreigners and of others who are brought from a distance to the place of trial requires to be scrutinized with more than common caution. Such persons speak before a tribunal, which ordinarily knows no more of them than they care for it to know, whose threat they have no reason to fear, and whose good opinion they utterly disregard. Consequently they are obviously far less likely to be influenced by the dread of having their falsehoods exposed than witnesses living on the spot. Such witnesses, even if detected of perjury, have little to fear from loss of character, and are in no real danger of punishment. A dishonest foreigner, who has attained a tolerable knowledge of our language, may conceal it, and by seeking the assistance of an interpreter, obtain an opportunity of preparing with caution his answer to any inconvenient question during the time that the interpreter is furnishing him with a needless translation.

Testimony of policemen.

"The testimony against a prisoner of *policemen and*

[1] Oaths Acts, 1888 and 1909 (51 & 52 Vict. c. 46 and 9 Edw. 7, c. 39); Adm. Inst. 679; C. M. Memo. p. 36.

[2] 1 Starkie Ev. 25.

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others employed in the suppression and detection of crime, should usually be watched with care; not because they intentionally pervert the truth, but because their professional zeal and habitual contact with bad men and women almost necessarily leads them to ascribe all actions to the worst motives, and to give a colouring of guilt to facts and conversations which in themselves are consistent with perfect rectitude."[1]

Such are the principles which govern the reception of *immediate* testimony.

The best evidence to be produced.

Combined with these tests is the rule of law which requires that *the best evidence of which the case is susceptible* should be produced, if it can possibly be obtained; if not, then the next best evidence that can be obtained is admitted. This means that, as a general rule, where a written document is to be used as proof, the original document itself must be produced, and where a fact can be proved by persons who actually saw or heard it, they must be called; for if the best evidence be not produced, it affords a presumption that it would make against the party neglecting to produce it. This has the effect of excluding all intervening testimony, subject to exceptions under certain recognized legal conditions. In requiring the production of the best evidence applicable to each particular fact, it is meant that no evidence shall be received which is merely substitutionary in its nature, so long as the original evidence is attainable.[2]

Primary and secondary evidence.

This rule naturally leads to the division of evidence into *primary* and *secondary*—a distinction referring only to the *quality*, and not to the *strength* of the proof. The most important application of this principle is that which rejects secondary and requires primary evidence of the contents of written documents of every description, by the production of the written documents themselves.

[1] 1 Taylor, 10th ed., 63.
[2] Ibid. 391.

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Therefore, before a copy of a written instrument, or parol evidence of its contents, can be received as proof, the absence of the original instrument must be accounted for by proving that it is lost or destroyed, or that it is in possession of the opposite party. Thus, where it is sought to give in evidence the contents of a telegram sent by the prisoner to a witness, the original message handed to the post office should be produced, and the copy received by the witness cannot be given in evidence, unless it is proved that such original has been lost or destroyed, and some evidence should be given that the message was in the handwriting of the prisoner or sent by his authority.[1] The rule requiring primary evidence of written documents, by the production of the documents themselves, was so stated by the judges on the occasion of the trial of Queen Caroline,[2] and is perfectly general in its application, the only exceptions to it being founded on special grounds. These may be divided into the following classes: (1) Where the written document is lost or destroyed; (2) Where the production of the document would be, on physical grounds, impossible or highly inconvenient; (3) Where it is in the possession of an adverse party who refuses or neglects to produce it; (4) Where it is in the possession of a party who is privileged to withhold it, and who insists on his privilege; (5) Where the document is of a public nature, and some other mode of proof has been specially substituted for reasons of convenience. Evidence which carries on its face no indication that better remains behind, is not secondary, but primary.

Primary evidence, what it consists of.

Primary evidence, or, in other words, that kind of proof which in the eye of the law affords the greatest certainty of the fact in question, may consist either of parol evidence, where the fact is to be established by the

[1] *R.* v. *Regan* (1886), 16 Cox, 203.
[2] (1820), 2 B. & B. 286.

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direct testimony of witnesses, or of written instruments, where the proof depends on a subject-matter which has been reduced to writing, and no other proof of the fact is in general admitted, until it is shown that the production of this evidence is out of the party's power. All evidence falling short of this in its degree is termed *secondary*, and may consist either of parol evidence in the nature of *hearsay*, or of parol evidence in *substitution for written evidence*, or *of written* copies *of original documents*.

Parol evidence is admissible (1) When it is the best evidence of the facts to be proved, *e.g.*, where it is the evidence of a person who saw or heard them; (2) As secondary evidence of the contents of writings, in which case it is inferior to the evidence of the documents themselves.

Parol, where permissible.

Facts may be proved by parol, though a narrative of them may exist in writing. Thus a person who pays money may prove the fact of payment without producing the receipt which he took.[1] So a person who takes notes of a conversation need not produce them in proving the conversation, as they would not be evidence if produced.[2] The fact of a marriage may be proved by a person who was present, and it is not necessary to produce the parish register as the primary evidence.[3] But it has been held that where there exists a copy of the original document, the document cannot be proved by a copy of that copy.[4] As a general rule, parol evidence is not admissible as to anything not immediately within the knowledge of the witness: he must speak of facts which happened in his presence, or within his hearing. This rule excludes hearsay evidence save in

[1] *Rambert* v. *Cohen* (1802), 4 Esp. 213.
[2] 12 Vin. Abr. 96.
[3] *Morris* v. *Miller*, 1 W. Bl. 632.
[4] *Liebman* v. *Pooley* (1816), 1 Stark. (N. P.) 167.

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the cases mentioned on p. 345. It also, as a general rule, excludes the expression of opinion or belief. But to this rule there is a necessary exception on questions of the identity of things or persons, or the genuineness of handwriting, where the witness is qualified to express a credible opinion or belief on the subject.[1] And in matters of science or trade, an expert, or person intimately acquained with it, may be called upon to give his opinion as to the probable result or consequence from certain facts already proved. For instance, if it were required to determine whether a man died of any particular disease, symptoms being proved, a physician may be called upon to give in evidence his opinion as to the disease of which the party died, as founded upon the symptoms so proved, although he has never seen the deceased. So upon a charge for murder, the deceased's wounds, &c., being described, a surgeon may be called upon to give in evidence his opinion whether the deceased died in consequence of his wounds or from natural causes. Upon a question of insanity, a medical man may be asked whether such and such appearances are, in his judgment, symptoms of insanity; but he cannot be asked if, from the testimony given, the act with which the prisoner is charged is, in his opinion, an act of insanity, which is the very point to be decided by the court-martial.[2]

Proof of handwriting.

In proving handwriting the evidence of third persons is not inferior to that of the party himself. "Such evidence is not in its nature inferior or secondary, and though it may generally be true that a writer is best acquainted with his own handwriting, and therefore his evidence will generally be thought the most satisfactory,

[1] *R.* v. *Silverlock*, [1894] 2 Q. B. 766; 1 Taylor Ev., 10th ed., ss. 1414 *et seq.*

[2] *R.* v. *Wright* (1821), R. & R. 456; 1 Taylor Ev., 10th ed., s. 1421; 2 Russ., 7th ed., 2260.

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yet his knowledge is acquired precisely by the same means as the knowledge of other persons who have been in the habit of seeing him write, and differs not so much in kind as in degree. The testimony of such persons, therefore, is not of a secondary species, nor does it give reason to suspect, as in the case where primary evidence is withheld, that the fact to which they speak is not true."[1] Mr. Justice Patteson said,[2] "All evidence of handwriting, except where the witness sees the document written, is in its nature comparison. It is the belief which a witness entertains upon comparing the writing in question with an examplar in his mind derived from some previous knowledge. That knowledge may have been acquired, either by seeing the party write, in which case it will be stronger or weaker, according to the number of times and the periods, and other circumstances under which the witness has seen the party write, but it will be sufficient to admit the evidence of the witness (however little weight may be attached to it in such cases), even if he has seen him write but once, and then merely signing his surname; or the knowledge may have been acquired by the witness having seen letters or other documents professing to be the handwriting of the party, and having afterwards communicated personally with the party upon the contents of those letters or documents, or having otherwise acted upon them by written answers, producing further correspondence, or acquiescence by the party in some matter to which they relate, or by the witness transacting with the party some business to which they relate, or by any other mode of communication between the party and the witness which, in the ordinary course of the transactions of life, induces a reasonable presumption that the letters

[1] 1 Phill. Ev., 6th ed., 212.
[2] *Doe d. Mudd* v. *Suckermore* (1836), 5 A. & E. 730.

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or documents were in the handwriting of the party; evidence of the identity of the party being of course added from another source if the witness be not personally acquainted with him."

When secondary evidence is admissible.

In certain cases secondary evidence of the contents of written documents is admissible. The most frequent case is that in which the document has been lost or destroyed. In order to lay the necessary foundation for the admission of secondary evidence in this case it must be shown that the document has once existed, and has either actually ceased to exist, or that all reasonable efforts have been made to find it and have failed. The degree of diligence to be exercised in searching for a document will depend, in a great measure, on its importance. In the case of a useless document the presumption is that it is destroyed, and where the loss or destruction of a paper is highly probable, very slight evidence is sufficient. Where it is the duty of the party in possession of a document to deposit it in a particular place, and it is not found in that place, the presumption is that it is lost or destroyed. After the primary evidence is proved to be in the possession of the adverse party, the party offering secondary evidence must prove that he has given notice to the other side to produce the primary evidence. Such notice may be by parol as well as in writing, and if both a parol and written notice have been given, proof of either is sufficient. It should not be general, but should specify the documents to be produced, and it should be served in reasonable time. In secondary evidence there are no degrees, that is, no precedence or superiority in point of admissibility. An attested copy of a written instrument is not of a superior value in proof to an examined copy, nor is an examined copy superior to parol evidence of the contents.[1] A copy of a document taken by a machine worked by the witness

[1] 2 Phill. Ev. 236.

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who produces the copy, is good secondary evidence, though it was not compared with the original.[1]

In criminal cases, from the secret manner in which guilty actions are generally perpetrated, it is seldom possible to give direct evidence of the commission of the offence charged; that is, to produce a witness who saw the act committed; and therefore recourse must necessarily be had to presumptive (or, as it is often called, circumstantial) evidence; that is, the direct evidence of circumstances from which the commission of the act may be presumed.

Section II.

Presumptive Evidence.

General rules.

The question often arises, which is the more cogent—direct, or circumstantial evidence? When the evidence tendered directly establishes the fact in issue, it is called direct. Thus the evidence of a bystander who saw the occurrence is direct oral evidence of the events which happened.

Evidence is said to be presumptive, circumstantial, or inferential, as distinguished from direct, when an inference as to a disputed fact is drawn from the proof or assumption of a collateral fact. In *R.* v. *Burdett*[2] Abbott, C. J., said: "A presumption of any fact is properly an inference of that fact from other facts that are known; it is an act of reasoning; and much of human knowledge on all subjects is derived from this source. A fact must not be inferred without premises that will warrant the inference; but if no fact could thus be ascertained by inference in a court of law, very few offenders could be brought to punishment. In a great portion of trials, as they occur in practice, no

[1] *Simpson* v. *Thornton* (1842), 2 M. & Rob. 433.
[2] (1820), 4 B. & Ald. 161.

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direct proof that the party accused actually committed the crime is or can be given: the man who is charged with theft is rarely seen to break the house or take the goods; and, in cases of murder, it rarely happens that the eye of any witness sees the fatal blow struck, or the poisonous ingredients poured into the cup. In drawing an inference or conclusion from facts proved, regard must always be had to the nature of the particular case, and the facility that appears to be afforded either of explanation or contradiction. No person is to be required to explain or contradict until enough has been proved to warrant a reasonable and just conclusion against him, in the absence of explanation or contradiction; but when such proof has been given, and the nature of the case is such as to admit of explanation or contradiction if the conclusion to which the proof tends be untrue, and the accused offers no explanation or contradiction, can human reason do otherwise than adopt the conclusion to which the proof tends? The premises may lead more or less strongly to the conclusion, and care must be taken not to draw the conclusion hastily."

The direct evidence of a bystander who states that he saw with his own eyes what was done is *primâ facie* the most reliable, unless there is any reason for doubting either his veracity or his powers of observation. Yet a jury is often loth to convict a prisoner on the uncorroborated evidence of one man. In criminal cases juries undoubtedly prefer to have the fact proved by direct evidence; but if the circumstantial evidence dovetails well together, and raises a violent presumption of the prisoner's guilt, then it will be as cogent as direct evidence.

When a fact cannot be directly proved by an eye-witness or an ear-witness, or an authentic or probative document, that which comes nearest to the proof of the fact is the proof of the circumstances which necessarily

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or usually attend such facts. Proof of the existence of such circumstances creates a presumption, *i.e.*, entitles the court or jury to infer that the fact itself existed or did not exist, unless and until the presumption or inference is rebutted by other evidence, for they stand instead of the proofs till the contrary be proved.

Presumptions are Divided into Presumptions of Fact and Presumptions of Law.

Classes of presumptions.

Presumptions of fact are rebuttable, and even if not rebutted, are not conclusive. Presumptions of law are divided into those which are rebuttable, but if not rebutted, are conclusive (*presumptiones juris*), and those which are irrebuttable, and therefore conclusive (*presumptiones juris et de jure*). There are also mixed presumptions, or presumptions of law and fact mixed.

Presumptions of fact.

Presumptions of fact are almost infinite in number, corresponding to the innumerable circumstances of human life. While many of them are as special in their character as the circumstances in which they arise, others are of such common occurrence that they are among the commonplaces of the law courts, and tend to assume the character of fixed rules. A presumption arises where, from the proof of some fact, the existence of another fact may naturally be inferred from the mere probability of its having occurred, without further proof. Presumptions of fact are usually divided into three classes—*violent* presumptions where the facts and circumstances proved *necessarily* attend the fact presumed, *probable* presumptions, where the facts and circumstances proved *usually* attend the fact presumed,[1]

[1] 3 Bl. Com. 372.

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and *light* or *rash* presumptions, which have no weight or validity at all. If, upon an indictment for murder, it is proved that the deceased was murdered in a house, and that the prisoner was immediately afterwards seen running out of it with a bloody sword in his hand, these facts would raise a violent presumption that the prisoner was the murderer; for the blood, the weapon, and the hasty flight are all circumstances necessarily attending the fact presumed, namely, the murder.[1] So upon an indictment for stealing in a dwelling-house, if the prisoner was apprehended a few yards from the outer door, with the stolen goods in his possession, there would arise a violent presumption of his having stolen them; but if they were found in his lodgings some time after the larceny, and he refused to account for his possession of them, this, together with proof that they were actually stolen, would amount, not to a violent but to a probable presumption merely; but if the property was not found recently after the loss, as, for instance, not till sixteen months after, it would be merely a light or rash presumption, and entitled to no weight.[2] If the prisoner gives a reasonable account of the manner in which he became possessed of the goods, this will so far rebut the presumption as to throw it upon the prosecutor to negative that account.[3] If he fails to give a reasonable explanation on the first opportunity, or gives inconsistent explanations, or does not give evidence on his own behalf in support of the explanation, he may confirm the presumption of guilt.[4] And generally where the facts proved by the prosecution amount to evidence, establishing a *primâ facie* case, the defendant is put to explain or rebut the presumption thus created, and if his explanations are not such as the jury can properly

[1] Co. Litt. 6 *b*.
[2] *Anon.* (1826), 2 C. & P. 459.
[3] *R.* v. *Crowhurst* (1844), 1 C. & K. 370.
[4] See *R.* v. *Kelson* (1909), 3 Cr. App. R. 231; *R.* v. *Theodorus*, ibid. 269.

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accept, they are entitled to convict on the presumptions raised by the prosecution.[1] So where on the trial of an indictment for receiving stolen goods it appeared that the prisoner had told the constable who found the stolen property in his possession that he had purchased it of a tradesman in the same town, and that tradesman, although known, was not called for the prosecution, it was held that, there being other circumstances in the case from which the jury might fairly infer the falsehood of the prisoner's story, it was unnecessary to call the tradesman on the part of the prosecution.[2] The presumption of guilt arising from the possession of stolen property will, of course, vary according to the nature of the property stolen, and whether it is or is not likely to pass readily from hand to hand.[3] The presumption under discussion is not confined to charges of theft, but extends to all charges, however penal. Thus, on an indictment for arson, proof that property which was in a house at the time it was burnt, was soon afterwards found in the possession of the prisoner, raises a probable presumption that he was present and concerned in burning the house;[4] and under similar circumstances a like inference arises in the cases of murder accompanied by robbery, of burglary,[5] and of the possession of a quantity of counterfeit money.[6] Upon an indictment for disposing of and putting away a forged bank note, knowing it to be forged, proof that the defendant has passed other forged notes raises a *probable* presumption of a guilty knowledge.

The law presumes fulfilment where any act is required

[1] *R.* v. *Stoddart* (1909), 2 Cr. App. R. 217, 242.
[2] *R.* v. *Ritson* (1884), 15 Cox, 478.
[3] See *R.* v. *Partridge* (1836), 7 C. & P. 551.
[4] *R.* v. *Rickman* (1789), 2 East, P. C. 1034.
[5] See *R.* v. *Gould* (1840), 9 C. & P. 364; *R.* v. *Exall* (1866), 4 F. & F. 922.
[6] *R.* v. *Fuller* (1816), R. & R. C. C. 308; *R.* v. *Jarvis* (1855), 25 L. J. M. C. 30.

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to be done on the one part, so that the party neglecting it would be guilty of a criminal neglect of duty in not having done it; the law presumes the affirmative, and throws the burden of proving the negative on the other side. The rule under discussion also is subject to the qualification that if a negative averment be made by one party which is peculiarly within the knowledge of the other, the party within whose knowledge it lies, and who asserts the affirmative, is to prove it, and not he who avers the negative.[1]

Of innocence

A presumption of law arises in favour of innocence, until the contrary be proved; and it arises not only in matters essentially criminal, but in every instance the rule is, that illegality is never to be presumed, but that the presumption always is, that a party complies with the law. So it is a legal maxim that "*omnia presumuntur esse rite et solemniter acta, donec probetur in contrarium*"; and, therefore, it is a general presumption of law, that a person acting in a public capacity, as a justice of the peace, a constable, an officer in the army or navy on service, &c., is duly authorized to do so, and that even in a case of murder.

Intention of consequences.

The law presumes that every person intends the probable consequences of his acts. Thus, in homicide, when the death is proved, malice is presumed; and it is for the prisoner to prove the extenuating circumstances which may reduce the act from murder to manslaughter, or to justifiable or excusable homicide; and when the death of another person is caused by a wanton act of the prisoner, he is guilty of murder, as if he purposely drove a carriage furiously amongst a number of people, or discharged a loaded gun in the middle of a crowd.[2] Mr. Justice Best said, with respect to the word "malice": "The legal import of this term differs

[1] *Per* Bayley, J., *R.* v. *Turner* (1816), 5 M. & S. 211.
[2] 1 Hale, P. C. 475.

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from its acceptation in ordinary conversation. It is not, as in ordinary speech, only an expression of hatred and ill-will to an individual, but means any wicked or mischievous intention of the mind. Thus in the crime of murder, which is always stated to be committed with malice aforethought, it is not necessary to show that the prisoner had any enmity to the deceased; nor would proof of absence of ill-will furnish the accused with any defence, when it is proved that the act of killing was intentional and done without any justifiable or excusable cause."[1] All, therefore, that is meant by the presumption of malice is that when a man commits an unlawful act, unaccompanied by any circumstances justifying its commission, it is presumed that he has done it advisedly, and with an intent to produce the natural consequences of such an act. Thus in *R.* v. *Dixon*[2] upon an indictment against the defendant, who was employed to make bread for a military hospital, for delivering bread made from unwholesome materials, it was held to be unnecessary to allege in the indictment, and therefore, of course, unnecessary to prove, that the defendant intended to injure the health of anyone, as there was an inference of law arising from the doing of the act.

Conduct of accused.

In almost every criminal case a portion of the evidence laid before the jury consists of the conduct of the party, either before or after being charged with the offence, presented not as part of the *res gestæ* of the criminal act itself, but as indicative of a guilty mind. In weighing the effect of such evidence nothing more than ordinary caution is required. If circumstances induce a strong suspicion of guilt, where the accused might, if he were innocent, explain those circumstances consistently with his own innocence, and yet does not offer such

[1] *R.* v. *Harvey* (1823), 2 B. & C. 268.
[2] (1814), 3 M. & S. 15.

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explanation, a strong natural presumption arises that he is guilty. And, in general, where a party has the means of rebutting and explaining the evidence adduced against him, the omission to do so furnishes a forcible inference against him.

Presumption as to enemy's despatches

Despatches of the enemy, which a neutral vessel is found carrying between different parts of the enemy's dominions, are presumed to be hostile,[1] at least, if they have been fraudulently concealed. The spoliation of papers by a captured party is regarded, in all the States of continental Europe, as giving rise to a conclusive presumption of guilt; but in general, in England and America, the presumption of guilt is only *primâ facie*, and is open to explanation. English and American law are more lenient, and do not found on the mere spoliation of papers an absolute presumption of guilt. But they only stop short of that result; for a case that escapes with such a brand upon it is saved, as it were, from the fire,[2] and when the case labours under other circumstances of suspicion, or the surrounding circumstances establish bad faith or gross prevarication, the presumption is, even in English and American law, conclusive.[3] Again, a presumption, all but conclusive, is raised against any vessel which has been captured while entering a blockaded port; and the owner can protect the ship from being condemned as lawful prize only by establishing a justification on the ground of imperative necessity.[4] It is, moreover, also presumed *primâ facie* that the owners of a cargo found on board a ship, which is condemned for blockade-running, were privy to the intention of violating a blockade, and their only escape from this presumption is their being able to prove that, at the

As to character of blockade-runners.

[1] *The Atalanta* (1808), 6 C. Rob. 440.
[2] *The Hunter* (1815), 1 Dods. Adm. 480.
[3] *The Pizarro* (1817), 2 Wheat. 227.
[4] *Baltazzi* v. *Ryder* (1858), 12 Moo. P. C. 168.

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time when the shipment was made, they could not have known that the blockade had been imposed.

Certain maritime presumptions.

Again, in maritime cases, certain presumptions are made by the Admiralty Division of the High Court, which technically shift the burden of proof. Thus if two vessels come into collision, of which one was at anchor,[1] or, "in stays,"[2] at the time, the fact so far raises a presumption in her favour that she is so far *presumed* to be without blame; and the burden of proof rests on the opposite side to establish, either that the other vessel was to blame, or had been improperly put "in stays," or that the damage was occasioned by stress of weather, or by other unavoidable accident. Again, in the case of a collision between two ships, if the master of either ship fail to render assistance to the other, and to stay by her for that purpose, the collision shall, in the absence of proof to the contrary, be deemed to have been caused by the wrongful act of the defaulter.[3] Moreover, the infringement of any regulation[4] for preventing collisions at sea, made under the Merchant Shipping Act, 1894, s. 503, raises a presumption of blame as against the infringer, unless he can show that circumstances "made a departure from the regulation necessary," leaving no margin for discretion.[5] Again, if a salvor's vessel be injured or lost while engaged in a salvage service, the Admiralty Division presumes *primâ facie* that such injury or loss was caused by the necessities of the service, and not by the salvor's default.[6] Another presumption of maritime law, moreover, is in favour of the rights of property in the owners, whenever any question of derelict

[1] *The Bothnia* (1860), 29 L. J. P. 65.
[2] *The Sea Nymph* (1860), Lush. Adm. 23.
[3] *The Queen* (1869), L. R. 2 Adm. 354; M. S. Act, 1894, s. 422.
[4] Order in Council, 27th Nov., 1896.
[5] M. S. Act, 1894, s. 419; *Stoomvaart, &c.* v. *P. & O. S. N. Co.* (1880), 5 A. C. 876.
[6] *The Thomas Blyth* (1860), Lush. Adm. 16; *The Baku Standard*, [1901] A. C. 549.

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is mooted between them and the salvors. Therefore, where salvors make a claim, as in the case of dereliction, it will not suffice for them to merely prove that they found the vessel at sea apparently abandoned, but they must go further, and prove that the master and crew, when they left the vessel, did so without any hope, expectation, or intention of being able to return, or, in the technical language of law, *sine spe recuperandi*.[1]

A *primâ facie* presumption in insurance law is that if a vessel has sailed, and no tidings of her have been received within a reasonable time, she is presumed to have *foundered* at sea.[2]

By "tidings" are meant not mere rumours, but some actual intelligence received from persons capable of giving an authentic account.[3]

Conclusive presumptions.

In weighing the value of circumstantial evidence, it is most important to ascertain that the different circumstances which form together the links of a transaction should *all* so concur as to fix the presumption of guilt on the accused; if they do so, and especially if they be such as the accuser could have no control over, the conclusion can scarcely be erroneous.[4]

Where an indictment for murder was supported entirely by circumstantial evidence, and there was no fact which, taken alone, amounted to a presumption of guilt, Baron Alderson told the jury that before they could find the prisoner guilty, they must be satisfied, "not only that those circumstances were consistent with his having committed the act, but they must also be satisfied that the facts were such as to be inconsistent with any other rational conclusion than that the prisoner was the guilty person"; and he then pointed out to them the proneness of the human mind to look for and

[1] 1 Taylor Ev., 10th ed., 206, 207.
[2] *Green* v. *Brown* (1744), 2 Str. 1199.
[3] *Koster* v. *Reed* (1826), 6 B. & C. 22.
[4] 1 Phill. Ev. 166.

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often slightly to distort facts in order to establish such a proposition, forgetting that a single circumstance which is inconsistent with such a conclusion, is of more importance than all the rest, inasmuch as it destroys the hypothesis of guilt.[1]

In murder cases, evidence of the existence of a bad feeling between the parties, or of former threats of violence by the prisoner against the deceased, or of other attempts made by him on the life of the deceased is admissible to prove malice.[2]

Of death.

The death of a person is presumed if he has been continuously absent from home and unheard of during seven years, and the burden of proving his existence is thrown on the opposite party.

Cautions applicable to presumptive evidence.

It may be proper here to mention the two well-known cautions of Lord Hale respecting presumptive evidence—viz., 1. That a person should never be convicted for stealing the goods of some unknown person, because he cannot give an account of how he came by them, unless there be due proof made that a felony was committed of these goods. 2. That a person should never be convicted of murder, or manslaughter, unless the fact were proved to be done, or at least the body found dead.[3]

But this rule or caution must be taken with some qualifications, and circumstances may be sufficiently strong to show the fact of the murder, though the body has never been found. Thus where the prisoner, a mariner, was indicted for the murder of his captain at sea, and a witness stated that the prisoner had proposed to kill the captain, and that the witness being afterwards alarmed in the night by a violent noise, went upon deck, and there observed the witness take the captain up and

[1] *R.* v. *Hodge* (1838), 2 Lew. C. C. 227; and see *R.* v. *Gardner* (1859), 1 F. & F. 669.

[2] *R.* v. *Clewes* (1838), 4 C. & P. 221; *R.* v. *Hagan* (1873), 12 Cox, C. C. 357; *R.* v. *Weston* (1879), 14 Cox, C. C. 346, 350.

[3] 2 Russ., 7th ed., 822.

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throw him overboard into the sea, and that he was not seen or heard of afterwards; and that near the place on the deck a billet of wood was found, and the deck and part of the prisoner's dress were stained with blood; the court, though they admitted the general rule of law, left it to the jury to say upon the evidence, whether the deceased was not killed before his body was cast into the sea; and the jury being of that opinion, the prisoner was convicted and was afterwards executed.[1]

Section III.

Hearsay Evidence.

There is no rule in the law of evidence more important or more frequently applied than the general one, that hearsay evidence of a fact is not admissible. And the same rule applies to the written statements of either living or deceased persons.

A less ambiguous term by which to describe this species of evidence is second-hand evidence.

Definition of hearsay evidence.

The term *hearsay* is used with reference to what is *done* or *written*, as well as to what is spoken; and, in its legal sense, it denotes that kind of evidence which does not derive its value solely from the credit given to the witness himself, but which rests also in part on the veracity and competence of some other person.[2] The statement of a person who is not called as a witness is none the less "hearsay" because it has been reduced to writing, and is offered in that form to the court. But in its application to documents of a public or official character, the rule is subject to very important qualifications. In the case of many such documents, the statements which they contain are, either under the general

"Hearsay" not necessarily oral.

[1] *R.* v. *Hindmarsh* (1792), 2 Leach, 569; *R.* v. *Armstrong* (1875), 13 Cox, 184.

[2] 1 Phill. Ev. 185.

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law, or under express statutory provisions, admissible as evidence as to the matters to which they relate. An entry in any record, official book, or register kept in the British dominions, or at sea, or in a foreign country, made in proper time by any person in the discharge of any duty imposed on him by law, is admissible as evidence of the facts to which it relates. Official records.

This species of evidence is rejected not only because it is not given upon oath, because it cannot be tested by cross-examination, and because it supposes some better testimony which might be adduced in the particular case, but also because of its tendency to protract legal investigations to an embarrassing and dangerous length, its intrinsic weakness, its incompetency to satisfy the mind as to the existence of the fact, and because of the frauds which might be practised with impunity under its cover.[1] Reasons for the exclusion of hearsay evidence.

The rule excluding such evidence has been recognized in England as a fundamental principle ever since the time of Charles II.[2] It even applies in cases where no other evidence can possibly be obtained. For example, a statement not on oath by a dead man who was the only eye-witness of a transaction is inadmissible.[3] In Scotland the rule is otherwise; evidence on the relation of others being admitted, where the relator is since dead, and would, if living, have been a competent witness.[4] Even in English courts hearsay evidence is often admitted and acted upon in affidavits, which are submitted to the judges only. Antiquity of rule. Rule in Scotland.

Though, as a general rule, hearsay, or, as it may more properly be called, second-hand evidence, is inadmissible, there are a considerable number of exceptions to the Exceptions to the exclusion of hearsay evidence.

[1] 1 Taylor Ev. 518.
[2] One of the earliest cases in which this rule was acted upon was *Sampson* v. *Yardley* (1667), 2 Keb. 223, pl. 74.
[3] 1 Taylor Ev. 568.
[4] See 1 Dickson Ev. Sc. 66, 67; Dysart Peer. H. L. 1881, where the extent of and exceptions to the rule are discussed at some length.

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rule, which appear to be founded partly on the principle of necessity (hearsay being sometimes almost the only sort of evidence which is available), and partly in the statement, of which evidence is given, having been made under circumstances which render its falsity highly improbable. They may be conveniently divided into the following heads: 1. Evidence which has already been given in judicial proceedings, and which cannot be obtained from the original source. 2. Statements of deceased persons speaking against their own interest. 3. Statements of deceased persons making entries, &c., in the regular course of their duty or employment. 4. Statements having reference to the health or suffering of the person who makes them. 5. Dying declarations.

Testimony of deceased witness.

If there has been a previous criminal prosecution between the same parties, and the point in issue was substantially the same, the testimony of a deceased witness given upon oath at the former trial is admissible on the subsequent trial, and may be proved by one who heard him give evidence, provided the accused had the right and opportunity to cross-examine the deceased witness at the former trial.

Declarations by deceased persons against their own interest.

Declarations[1] or statements made by deceased persons where they appear to be against their own pecuniary or proprietary interest, have in many cases been admitted as evidence of all the facts declared, as entries in their books charging themselves with the receipt of money on account of a third person[2] or acknowledging the payment of money due to themselves. Such declarations

[1] The term "declaration," with regard to both declarations against interest and declarations made in the course of duty or business, includes a mere *oral* statement, as well as a written memorandum. The former may indeed be entitled to less weight than the latter, but the law recognizes no distinction between statements made by word of mouth and those made in writing, except where the writing is by deed, or is rendered necessary by some statute.

[2] *Middleton* v. *Melton* (1829), 10 B. & C. 317.

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are admissible only on the ground that they are against the *proprietary or pecuniary* interest of the party making them, and a declaration is not receivable in evidence because it would subject the party to a prosecution if he was living. Thus, if A. was indicted for murder, and B., who was dead, had made a declaration that he was present when the murder was committed, though that declaration was against his interest, and would have subjected him to a prosecution if living, yet it would not be admissible after his death.[1] Accounts will be received in evidence, as being declarations of a deceased person charging himself, if they were written by him either wholly or in part, though they were not signed; or if they were signed by him, though they were written by a stranger.[2] So they will also be, though they were neither written nor signed by the deceased, if either direct proof can be furnished that they were written by his authorized agent, or if that fact can be indirectly established, as, for instance, by showing that the deceased subsequently adopted the accounts as his own, and delivered them in at an audit.[3] Nor does it signify in such a case whether the party who actually wrote the accounts is alive or dead at the time of trial, though if he is alive, his non-production may be a matter of observation.

Declarations in the course of deceased's duty or employment.

Another exception to the general rule that hearsay evidence must be rejected, consists of declarations by deceased persons in *discharge of duty in the ordinary course of business or professional employment.* The rule is very commonly but inaccurately stated to be that all entries "made in the ordinary course of business" are admissible. But this is not so, and entries gratuitously made by a man, even in the ordinary course of business, merely for his own satisfaction, and not in the discharge of any *duty*, will not be admissible in evidence after his

[1] *Sussex Peerage case* (1844), 11 Cl. & F. 85.
[2] *Doe* v. *Stacey* (1833), 6 C. & P. 139.
[3] *Doe* v. *Hawkins* (1841), 10 L. J. Q. B. 285.

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death.[1] Such entries are not admitted, unless made contemporaneously with the doing, or entry of something which it was the professional or official duty of the deceased to do, or enter.[2] If a declaration made in the discharge of a duty by a deceased person is admissible, whether oral or written,[3] the person who made the entry must be proved to be dead; proof of his absence abroad is insufficient.[4] Declarations made in discharge of a duty are evidence only of the facts which it was the business of the writer to state, and must generally be contemporaneous with the act done, and relate to matters within the knowledge of the declarant.[5]

Statements as to bodily or mental feelings.

Whenever the *bodily or mental feelings* of an individual are material to be proved, the usual expressions of such feelings, made at the time in question, are also original evidence. And the question whether they were real or feigned is for the court-martial to determine. Thus, the representations by a *sick person* of the nature and effects of the *malady* under which he is labouring are receivable as original evidence, whether they are made to the medical attendant or to any other person, though the former are naturally entitled to greater weight than the latter, inasmuch as a medical man is far more capable than a man unacquainted with the symptoms of diseases of forming a correct judgment respecting the accuracy of the statements. Accordingly, on a trial for murder by poisoning, statements made by the deceased in conversation shortly before he took the poison have been received in evidence for the purpose of proving the state of his health at the time.[6] In indictments for

[1] See *Hope* v. *Hope*, [1893] W. N. 20.
[2] *Mercer* v. *Dunne*, [1905] 2 Ch. 538, 566.
[3] *Stapylton* v. *Clough* (1853), 2 E. & B. 933.
[4] *Cooper* v. *Marsden* (1793), 1 Esp. 2, where an entry by a bank-clerk who had since gone to India was rejected.
[5] *Smith* v. *Blake* (1867), L. R. 2 Q. B. 326; *Mercer* v. *Dunne*, [1905] 2 Ch. 565.
[6] *R.* v. *Johnson* (1847), 2 C. & K. 355.

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assault, what a man has said about himself to his surgeon is evidence to show what he suffered by reason of the assault;[1] on an indictment for highway robbery, the fact that the prosecutor, a few hours after the attack made upon him, complained to a constable that he had been robbed is perhaps admissible.[2] The witness, however, cannot be further asked whether on making the complaint, prosecutor mentioned anybody's name.

Dying declarations.

Dying Declarations.—Evidence of this kind, which is peculiar to trials for murder and manslaughter, has been considered by some to be admissible from necessity, since it often happens that there is no third person present to be an eye-witness to the fact.[3] But it was said by Chief Baron Eyre that the general principle upon which evidence of this kind is admitted is, that it is of declarations made in extremity, when the party is at the point of death, and when every hope of this world is gone, when every motive to falsehood is silenced, and the mind is induced by the most powerful considerations to speak the truth. A situation so solemn and so awful is considered by the law as creating an obligation equal to that which is imposed by an oath administered in court. "Dying declarations," said Mr. Justice Byles,[4] "ought to be admitted with scrupulous, I had almost said with superstitious, care. They have not necessarily the sanction of an oath; they are made in the absence of the prisoner; the person making them is not subject to cross-examination, and is in no peril of prosecution for perjury. There is also great danger of omissions and of misrepresentations, both by the declarant and the

[1] *Aveson* v. *Lord Kinnaird* (1805), 6 East, 188; *R.* v. *Gutteridge* (1840), 9 C. & P. 473.
[2] *R.* v. *Wink* (1834), 6 C. & P. 397; commented on in *R.* v. *Osborne* (1842), C. & Marsh, 624.
[3] 1 East, P. C. 353.
[4] *R.* v. *Jenkins*, L. R. 1 C. C. R. 193.

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witness. To make a dying declaration admissible, there must be an expectation of impending and almost immediate death from the causes then operating. The authorities show that there must be no hope whatever." There must be no hope, not only of ultimate recovery, but of a prolonged continuance of life. If that impression exists in the mind of the sufferer, it will not render the statement inadmissible though death does not in fact take place till some time afterwards. In order to judge whether or not such is the state of the mind of the person in question, the whole of the circumstances must be looked at. In *R.* v. *Hayward*,[1] Chief Justice Tindal observed that "any hope of recovery, however slight, existing in the mind of the deceased at the time of the declaration being made, would undoubtedly render the evidence of such declarations inadmissible." The following examples illustrate the point in question:—

Examples of dying declarations.

(*a*) At the time of making the statement the deceased had no hope of recovery, though his doctor had, and he lived ten days after making the statement. The statement was admitted as evidence.[2]

(*b*) The deceased, at the time of making the statement (which was written down), said something which was written down thus: "I make the above statement with the fear of death before me, and with no hope of recovery." On the statement being read over, she corrected this to "with no hope *at present* of my recovery." She died thirteen hours afterwards. The statement was not admitted as evidence.[3]

(*c*) A party expressed an opinion that she should not recover, and made a declaration at that time; but afterwards, on the same day, asked a person whether he thought she would "rise again"; it was held that this

[1] 6 C. & P. 157.
[2] *R.* v. *Mosley*, 1 Moo. C. C. 97.
[3] *R.* v. *Jenkins* (1869), L. R. 1 C. C. R. 187.

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showed such a hope of recovery as rendered the previous declaration inadmissible.[1]

(*d*) Where, however, it is clearly proved that the declaration was made under the solemn belief of impending death, it was held admissible, although the declarant at a later period of the same day thought she should recover.[2]

(*e*) So, where declarant, within half-an-hour before making her declaration, said, "I do not think I shall be long with you," and after the declaration, at the request of a doctor, had been made said "Yes," in answer to the doctor's question, "Do you make this statement with the fear of death before your eyes?" it was held that these circumstances did not warrant the conclusion that the declaration had been made under such a settled, hopeless expectation of immediate death as to render it admissible.[3]

(*f*) If the declarant believed himself to be in a dying state when he made the declaration, the fact that the surgeon thought him likely to recover will not render the declaration inadmissible.[4]

(*g*) It would seem that the nature of the wound may be of itself sufficient evidence of impending death.[5]

Dying declarations are only admissible where the death of the deceased is the subject of the charge and the cause of the death the subject of the dying declaration. A dying declaration is not admissible to disprove a fact upon which perjury is assigned [6]; nor to prove rape [7]; or robbery.[8] So, upon an indictment for administering

[1] *R.* v. *Fagent* (1835), 7 C. & P. 238; see *R.* v. *Megson* (1840), 9 C. & P 418.
[2] *R.* v. *Hubbard* (1881), 14 Cox, 565.
[3] *R.* v. *Gloster* (1888), 16 Cox, 471.
[4] *R.* v. *Peel* (1860), 2 F. & F. 21.
[5] *R.* v. *Woodcock* (1788), 1 Leach, 500; *R.* v. *Bonner* (1834), 6 C. & P, 386.
[6] *R.* v. *Mead* (1824), 2 B. & C. 605.
[7] *R.* v. *Newton* (1859), 1 F. & F. 641.
[8] *R.* v. *Lloyd* (1830), 4 C. & P. 233.

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savin or using instruments to procure abortion, or for using instruments with intent to procure miscarriage, the woman's dying declarations are not admissible, though they relate to the cause of her death.[1] The declaration need not be on oath;[2] it is equivalent to sworn evidence,[3] but no statement in the declaration is admissible which would not have been so if the declarant had been examined on oath.[4]

Dying declarations admissible for prisoner.

The dying declarations of the deceased are not only admissible against a prisoner, but also in his favour.

Contradiction of dying declarations.

Dying declarations are, of course, open to direct contradiction in the same manner as any other part of the case for the prosecution; and as a prisoner is at liberty to show that a prosecutor who appears in court against him is not to be believed upon his oath, he seems to be equally at liberty to prove that the character of the deceased was such that no reliance is to be placed on his dying declarations. As the declarations of a dying man are admitted on a supposition that, in his awful situation, on the confines of a future world, he had no motive to misrepresent, but, on the contrary, the strongest motives to speak without disguise and without malice, it necessarily follows that the party against whom they are produced in evidence may enter into the particulars of his state of mind and of his behaviour in his last moments, and may be allowed to show that the deceased was not of such a character as was likely to be impressed with a religious sense of his approaching dissolution.[5]

But where either the sense or conviction of approaching death is deficient or uncertain, or where it appears that the declarant had no sufficient belief in a future

[1] *R.* v. *Hutchinson* (1822), 2 B. & C. 608 *n.*
[2] *R.* v. *Bernadotti* (1869), 11 Cox, 3 6.
[3] *R.* v. *Ashton* (1837), 2 Lew. 147.
[4] See Arch., 7th ed., 383.
[5] 1 Phill. Ev. 242.

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state or in a future responsibility for his actions in this life, his dying declarations will not be received. Even when they are received, their value and credibility will vary infinitely according to the circumstances. In all cases a strong objection to their full credibility arises from the fact that they are usually given in evidence against one who has had no opportunity of cross-examining the declarant, and thus of refuting out of his own mouth the errors, omissions, contradictions, and possibly wilful misstatements which the latter may have committed. It often happens, also, that the declaration is made under great pressure, when the declarant is suffering from physical exhaustion or mental alienation, and when he is partially, or even wholly, unconscious of the full purport of his declaration. These considerations, combined with the strong objection of the English law to condemn any man on the testimony of one who is absent, or even a deceased witness, induce courts to regard this species of evidence with great watchfulness and suspicion. The judge, therefore, whose duty it is to inquire into the circumstances under which the declaration has been made, as a condition precedent to its admission, will generally exclude it if there appear to be any reasonable doubt as to the veracity, sanity, consciousness, or sense of religious responsibility or impending dissolution in the mind of the declarant at the time of the statement.

Dying Declarations when reduced into writing.—When a dying declaration is taken formally by a magistrate and reduced into writing, although perhaps more authentic, it is of no value as a deposition unless made in the presence of the prisoner and accompanied by the proper formalities for taking depositions: nor if these formalities have not been complied with is it admissible as a statement made in the presence of the prisoner, since he would not be likely to deny at once the statements made, but would wait his opportunity for cross-

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examination.[1] It has been held that if a dying declaration has been reduced into writing and signed by the deceased, secondary evidence cannot be given of its contents.[2] But mere notes of the declaration taken down by one of the parties who were present would not be even admissible. If a dying declaration is tendered in the form of answers to questions, both question and answer must be set out, and it is not sufficient to give merely the substance of the answers.[3]

Article 683 of the Admiralty Instructions provides that "If any material witness should be in hospital, or otherwise unable from sickness to appear before the court, the court shall adjourn, and his evidence shall be taken on oath before a magistrate or consul, in the presence of the judge-advocate, of the accused, of the accused's adviser, should there be one, and of the prosecutor; and full opportunity shall be afforded of cross-examining the witness. The judge-advocate shall take down the evidence, as in the case of other witnesses, and on his return to the court shall lay before it the evidence which has thus been taken, and shall attach it to the minutes."

Declarations and acts forming part of the *res gestæ*.

Another rule is that *declarations and acts* which form what is called part of the *res gestæ* are not regarded as hearsay, but admitted as original evidence. In the practical application of the doctrine as to the admission of evidence as part of the *res gestæ* two points deserve special attention. The first is, that declarations—though admissible as evidence of the declarant's *knowledge or belief* of the facts to which they relate, and of his *intentions* respecting them—are no proof whatever of the facts themselves. The second point to be observed with regard to the admission of hearsay evidence is, that although

[1] *R.* v. *Mitchell* (1892), 17 Cox, 503.
[2] *Per* Justice Coleridge, *R.* v. *Gay* (1835). 7 C. & P. 230.
[3] *Per* Justice Cave, *R.* v. *Mitchell.*

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acts, by whomsoever done, are *res gestæ* when they are relevant to the matter in issue,[1] yet if they are *irrelevant*, both the acts themselves and the declarations qualifying or explaining them will be rejected. In all these cases the principal points for consideration are whether the *circumstances and declarations* offered in proof were *so connected with the main facts* under consideration as to illustrate its character, to further its object, or to form, in conjunction with it, one continuous transaction. That the *acts* and the *declarations* must be connected together as regards time, and otherwise apply to the reception of evidence of the *acts and declarations* of one of several individuals in a company of conspirators as evidence against his fellows. Here, a foundation should first be laid by proof, sufficient to establish *primâ facie* the fact of the conspiracy between the parties, or at least tending to establish such fact. The connection of the individuals in the unlawful enterprise being thus shown, every act and declaration of each member of the confederacy, in pursuance of the original concerted plan, and with reference to the common object, is, in contemplation of law, the act and declaration of them all, and is, therefore, original evidence against each of them.[2] It makes no difference at what time the party accused is proved to have entered into the conspiracy or combination; because every one who agrees with others to effect a common illegal purpose is generally considered in law as a party to every act which either before had been done, or may afterwards be done, by the confederates in furtherance of the common design.[3] One or two individuals may have concocted the scheme, but all who afterwards join in carrying it out are equally guilty with the originators;[4] at least, if any evidence is forthcoming from which their adoption of the previous acts of the association can

Acts and declarations of conspirators.

[1] *Wright* v. *Doe* d. *Tatham* (1837) 7 A. & E. at p. 355.
[2] *R.* v. *Stone* (1796), 6 T. R. 528.
[3] *R.* v. *Watson* (1817), 2 Stark. R. 139.
[4] *R.* v. *Murphy* (1837), 8 C. & P. 310.

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reasonably be inferred. Neither does it matter whether the acts were done or the declaration made in the *presence* or in the *absence* of the accused, but everything said or done by any of the conspirators or accomplices in furtherance of the common object is evidence against each and all of the parties concerned, whether they were present or absent, and whether or not they were individually aware of what was taking place.[1] For example, it is on this principle that the cries of a mob, with whose proceedings the prisoner is connected, though made in his absence, are admissible against him as explanatory of the objects which he, in common with the multitude, had in view;[2] proof of expressions used by persons going to a meeting convened by the defendant is admissible,[3] and papers supporting defendant's views, publicly sold at meetings convened by him, may be received in evidence, though no proof is given connecting the defendant with the persons selling the papers.[4] Care, however, must be taken to distinguish between declarations which are either acts in themselves purporting to advance the objects of the criminal enterprise, or which accompany and explain such acts, and those statements (not amounting, of course, to admissions of the accused himself), whether written or oral, which, although made during the continuance of the plot, are in fact a *mere narrative* of the measures that have already been taken. These last statements are inadmissible. For example, a letter written by a co-conspirator to a private friend, who was unconnected with the plot, giving an account of the proceedings of a society to which the writer and the defendant were proved to have belonged, and enclosing several seditious songs stated to have been composed by the writer, and sung by him at a meeting

[1] *R.* v. *Brandreth* (1817), 32 How. St. Tr. 857.
[2] *R.* v. *Lord George Gordon* (1781), 21 How. St. Tr. 535.
[3] *R.* v. *Hunt* (1820), 3 B. & Ald. 566.
[4] *R.* v. *O'Connell* (1843—4), Arm. & T. 163 (Ir).

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of the society, has been rejected on the ground that such letter was not a transaction in support of the conspiracy, but merely a relation of the part which the writer had taken in the plot, and, as such, only admissible against himself.[1] On the other hand, a letter written by a co-conspirator to a delegate in the country, describing the events that had occurred in London, and encouraging him thereby to proceed in the criminal business in which he was engaged, being considered by the court as an act done in furtherance of the plot, has been received against the defendant, though no evidence was given to show that it had ever reached the person for whose perusal it was intended. In a similar way entries in books made in furtherance of a conspiracy are admissible,[2] but memoranda of payments made *after* the fraud by one conspirator to another are not. Neither is evidence of a conversation overheard between men apparently *returning* from a meeting, held within an hour before, about half a mile off, though it is offered as evidence, not only of the general nature of the meeting, but of the effect that was likely to be produced by the language there employed. In a word, the declarations of a conspirator or accomplice are receivable against his fellows only when they are in themselves acts, or when they accompany and explain acts, for which others are responsible; but not when they are in the nature of narratives, descriptions, or subsequent confessions.

On a somewhat similar principle, if, after his apprehension, papers are found on the person, or at the lodgings of a co-conspirator, they will be admissible or not against other alleged co-conspirators according as there is or is not evidence that they existed previously to the arrest of the prisoner who is on his trial. If there is no such evidence, they will be rejected, as a prisoner cannot be responsible for acts or writings which possibly

[1] *R.* v. *Hardy* (1794), 24 How. St. Tr. 704.
[2] *R.* v. *Blake* (1844), 13 L. J. M. C. 131.

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may not have existed until after the common enterprise was, so far as he was concerned, at an end;[1] but if their previous existence is established, either by direct proof, or by strong presumptive evidence, no objection to their admissibility can prevail.[2]

On an indictment for conspiracy, unpublished *writings* upon *abstract subjects* are certainly admissible in evidence if it is proved that they were intended to be used in furtherance of the common design. Possibly, too, such writings, although no proof that they were connected with the common design was given, would be in strictness admissible if they appeared to be *closely connected* with the nature and object of the alleged crime, but unpublished writings upon abstract subjects of a kindred nature with the crime charged, but having no direct relation to it, are certainly inadmissible. Where *conversations* of co-conspirators or accomplices are proved, the effect of the evidence will of course depend upon the surrounding circumstances, such as the fact and degree of the prisoner's attention to what was said, and his approval or disapproval thereof.[3]

Declarations accompanying acts.

Generally speaking, declarations accompanying acts are admissible in evidence, as showing the nature, character, and object of such acts. Thus, upon an indictment for manslaughter in killing a party by driving a cabriolet over him, it has been held that a statement made by the deceased immediately after the accident, as to the cause of the accident, was admissible.[4] In *R.* v. *Goddard*[5] the deceased, shortly after the occurrence which resulted in her death, was found in a fainting condition and apparently dying. It was proposed to give in evidence, as part of the *res gestæ*, a statement which she then made as to the cause of her

[1] *R.* v. *Hardy* (1794), 24 How. St. Tr. 704.
[2] *R.* v. *Watson* (1817), 2 Stark. R. 139.
[3] 1 Taylor Ev., 10th ed., 590—596.
[4] *R.* v. *Foster* (1834), 6 C. & P. 325.
[5] (1882), 15 Cox, 7.

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injuries. Mr. Justice Hawkins, however, refused to receive it in evidence as part of the *res gestæ*, but it afterwards appearing that the deceased had prefaced her statement by the words "I am dying, look to my children," he admitted the statement as a dying declaration. In *R.* v. *Lunny*[1] statements made by a deceased person to the first person who came up after the fatal wound was inflicted were held admissible as part of the *res gestæ*. Where on the trial of a prisoner for the murder of his wife, a neighbour swore that a week before the alleged crime was committed the deceased visited her house, bringing an axe and carving knife, and handed them to the witness, evidence was admitted of what was said by the deceased to the witness on handing her the instruments.[2]

So it is an every day's experience in actions of assault, that what a man himself has said to his surgeon is evidence to show what he suffered by the assault. Inquiries of patients by medical men, with the answers to them, are evidence of the state of health of the patients at the time,[3] and what were the symptoms, what the conduct of the parties themselves at the time, are always receivable in evidence upon such inquiries, and must be resorted to from the very nature of the thing. So, on a prosecution for robbery, it has been held that the fact of the party robbed making a complaint to a constable shortly after the robbery, and mentioning the name of the person as the name of one of the persons who had robbed him, is admissible. So, in prosecutions for rape and offences of a similar character, a statement in the nature of a complaint made by the prosecutrix to a third person not in the presence of the accused may be given in evidence, provided such statement is shown to have

[1] (1854), 6 Cox, 477 (Ir.).
[2] *R.* v. *Edwards* (1872), 12 Cox, 230.
[3] *Aveson* v. *Lord Kinnaird* (1805), 6 East, 193.

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been made at the first opportunity which reasonably offered itself after the commission of the offence.[1] It was formerly doubted whether the *particulars* of the complaint could be disclosed by the witnesses for the Crown, either as original or as confirmatory evidence; it is now, however, settled that such particulars may be given in evidence by the witnesses for the prosecution in rape or other kindred offences against women or girls (including indecent assault, and offences within 48 & 49 Vict. c. 69, ss. 4, 5), not as being evidence of the truth of the charge against the accused, but as evidence of the consistency of the conduct of the prosecutrix with the story told by her in the witness-box, and as negativing consent on her part.[2] The mere fact that the statement has been made in answer to a question will not in itself render it inadmissible, unless the question is of a leading and inducing or intimidating character; and it is for the judge in each case to determine whether the character of the question put, as well as other circumstances, such as the relation of the questions to the prosecutrix, is such as to render the statement not voluntary, and therefore inadmissible.[3] If a considerable time has elapsed between the commission of the offence charged and the complaint, the statement is inadmissible.[4]

Section IV.

Confessions and Admissions.

Difference between admissions and confessions.

The term *admission* is usually applied to *civil transactions*, and to those matters of fact, in criminal cases, which do not involve criminal intent;[5] while the term *confession* is generally used in criminal law, and as denoting

[1] *R.* v. *Osborne*, [1905] 1 K. B. 551.
[2] *R.* v. *Lillyman*, [1896] 2 Q. B. 167; *R.* v. *Rowland* (1898), 62 J. P. 459.
[3] *R.* v. *Osborne*, [1905] 1 K. B. 551.
[4] *R.* v. *Rush* (1896), 60 J. P. 777.
[5] *Lord Melville's trial* (1806), 29 How. St. Tr. 707.

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an *acknowledgment of guilt.* In the case of Lord Melville, who was charged (*inter alia*) with *criminal* misapplication of moneys received from the Exchequer, the admission of his agent and authorized receiver was held sufficient proof of the fact of such agent having received the public money. But had such admission been tendered in evidence to establish the *criminal* charge of misapplication of money, it would have been rejected. Lord Chancellor Erskine said: "This first step in the proof" (namely, the receipt of the money by the agent), "must advance by evidence applicable alike to civil as to criminal cases; for a fact must be established by the same evidence, whether it is to be followed by a criminal or civil consequence; but it is a totally different question in the consideration of criminal as distinguished from civil justice how the noble person now on trial may be affected by the fact when so established. The receipt by the paymaster would in itself involve him civilly, but could by no possibility convict him of a crime."[1]

None but *voluntary* confessions admissible.

A free and voluntary confession of guilt made by a prisoner, whether in the course of conversation with private individuals, or under examination before a magistrate, is admissible in evidence as the highest and most satisfactory proof, because it is fairly presumed that no man would make such a confession against himself, if the facts confessed were not true. But since a person charged with a crime may be induced by his situation either to criminate himself untruly, under the influence of excitement and terror, or trusting to a promise of forgiveness by a prosecutor or other person who may be presumed to have a power of pardoning, it has long been the policy of the criminal law to reject evidence of every confession or statement by a prisoner, which has been made under the pressure of any species of physical or moral duress. Whenever, therefore, at a

[1] (1806) 29 How. St. Tr. 764.

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criminal trial, there appears to be ground of reasonable suspicion that a confession of guilt has been elicited from a prisoner by a threat of punishment in the event of a refusal to confess, or by a promise of forgiveness on condition of confessing, the court will inquire strictly into the antecedent circumstances of the statement which is to be tendered, and will not receive it unless it is proved to have been the free and voluntary declaration of the prisoner.

Reasons for excluding confessions made under pressure.

The object of the rule relating to the exclusion of confessions is to exclude all confessions which may have been procured by the prisoner being led to suppose that it will be better for him to admit himself guilty of an offence which he really never committed. The general principle on which the decisions on this subject seem to have proceeded is this: that if under the circumstances there be reasonable ground for presuming that the disclosure was made under the influence of any promise or threat of a *temporal nature*, the evidence ought not to be received, but hopes which are referable to *a future state merely* are not within this principle, which excludes confessions obtained by improper influence. The inducement must be held out by a person who is in authority, and who has presumably power to forgive. If, however, the inducement is made in the presence of a person in authority, such as a prosecutor, or one who is likely to be a prosecutor, who stands by and does not object, his silence is treated as a tacit acquiescence in the inducement, and the confession will be rejected;[1] but where one of two prisoners said to the other in the presence of the prosecutor and a policeman, "You had better tell him the truth," and neither the prosecutor nor the policeman spoke, a confession made by the prisoner so addressed was held admissible.[2] When the inducement

[1] *R.* v. *Luckhurst* (1853), Deara. 245.
[2] *R.* v. *Parker* (1861), L. & C. 42.

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is held out by a person who has no authority in the matter, a confession will be admissible. A confession obtained by mere official questions without threat or promise is admissible.[1]

If it be said to the defendant that it will be better or worse for him if he does or does not confess,[2] or if a confession be procured by a threat to take the defendant before a magistrate if he does not give a more satisfactory account,[3] or to send for a constable for that purpose;[4] or by saying, "Tell me where the things are, and I will be favourable to you";[5] or "You had better tell all you know";[6] or "You had better tell where you got the property";[7] or "You had better split, and not suffer for all of them";[8] or "It would have been better if you had told at first";[9] or "I should be obliged to you if you would tell us what you know about it; if you will not, of course we can do nothing";[10] or "it might be better for you to tell the truth and not a lie";[11] or "You had better tell me all about the corn that is gone,"[12] the confession will not be admissible. When the prosecutor asked the defendant for the money which he had taken, and before it was produced, said, "I only want my money, and if you give me that you may go to the devil if you please," upon which the defendant took part of the money from his pocket, and said that was all he had left, a majority of the judges held that the evidence was inadmissible.[13]

[1] *R.* v. *Thornton* (1824), 1 Mood. 27.
[2] 2 East, P. C. 659.
[3] *R.* v. *Thompson* (1783), 1 Leach, 291; *R.* v. *Parratt* (1831), 4 C. & P. 570.
[4] *R.* v. *Richards* (1832), 5 C. & P. 318.
[5] *R.* v. *Cars* (1784), 1 Leach 293 *n.*
[6] *R.* v. *Kingston* (1830), 4 C. & P. 387.
[7] *R.* v. *Dunn* (1831), 4 C. & P. 543.
[8] *R.* v. *Thomas* (1834), 6 C. & P. 353.
[9] *R.* v. *Walkley* (1833), 6 C. & P. 175.
[10] *R.* v. *Partridge* (1836), 7 C. & P. 551.
[11] *R.* v. *Bate* (1871), 11 Cox, 686.
[12] *R.* v. *Rose* (1898), 67 L. J. Q. B. 289.
[13] *R.* v. *Jones* (1809), R. & R. 152.

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Caution in receiving confessions.

Confessions ought to be received with great caution. Not only does considerable danger of mistake arise from the misapprehension or malice of witnesses, the misuse of words, the failure of the party to express his own meaning and the infirmity of memory, but the zeal which generally prevails to detect offenders, especially in cases of aggravated guilt, and the strong disposition which is often displayed by persons engaged in pursuit of evidence to magnify slight grounds of suspicion into sufficient proof — together with the character of the witnesses who are sometimes necessarily called in cases of secret and atrocious crime—all tend to impair the value of this kind of evidence, and sometimes lead to its rejection, where in civil actions it would have been received. Macaulay has remarked, "Words may easily be misunderstood by an honest man. They may easily be misconstrued by a knave. What was spoken metaphorically may be apprehended literally. What was spoken ludicrously may be apprehended seriously. A particle, a tense, a mood, an emphasis, may make the whole difference between guilt and innocence."[1] In addition to these sources of distrust, which are often sufficient to raise a serious doubt whether the confession given in evidence was actually made by the prisoner in the words, or to the effect, stated by the witnesses, there is yet another reason why caution should be employed in receiving and weighing confessions. The statements, though made as deposed to, may be *false*. The prisoner, oppressed by the calamity of his situation, may have been induced by motives of hope or fear to make an untrue confession.

The evidence as to whether the confession has been obtained by the influence of hope or fear, being in its nature preliminary, is addressed to the judge, who will require the prosecutor to show affirmatively, to his

[1] Hist. of Engl. i. c. 5, 583.

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satisfaction, that the statement was not made under the influence of an improper inducement, and who, in the event of any doubt subsisting on this head, will reject the confession.[1] If no *inducement* has been held out relating to the charge, it matters not indeed in what way the confession has been obtained; for whether it were induced by a solemn *promise of secrecy* even confirmed by an oath; or by reason of the prisoner having been made *drunken*, or even by *deception* practised upon him, or false representation made to him for that purpose, it will be equally admissible.

Facts revealed by confessions may be proved.

Facts discovered in consequence of a confession improperly obtained, and so much of the confession as distinctly relates to those facts, may be proved. Thus A., accused of burglary, makes a confession to a policeman under an inducement which prevents it from being voluntary. Part of it is that A. had thrown a lantern into a certain pond; the fact that he said so, and that the lantern was found in the pond in consequence, may be proved.[2]

Admissions and confessions, how proved.

Admissions or confessions to persons other than magistrates, if in writing, are proved as any other written instrument.[3] If made by parol, they are proved by parol evidence of some person who heard them. What the prisoner has been overheard to say to another, or to himself, is equally admissible, though it is evidence to be acted on with much caution, as liable to be unintentionally misrepresented by the witnesses.[4]

The whole of the confession to be given in evidence.

In all cases the whole of the confession should be given in evidence; for it is a general rule that the whole of an account which a person gives of a transaction must

[1] *R.* v. *Warrington* (1851), 2 Den. C. C. 447; *R.* v. *Thompson*, [1893] 2 Q. B. 12.
[2] *R.* v. *Gould* (1840), 9 C. & P. 364; see also *R.* v. *Lockhart* (1785), 1 Leach, 386.
[3] *R.* v. *Swatkins* (1831), 4 C. & P. 548.
[4] See *R.* v. *Simons* (1834), 6 C. & P. 540.

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be taken together; and his admission of a fact disadvantageous to himself shall not be received without receiving at the same time his contemporaneous assertion of a fact favourable to him; for it would not be just to take part of a conversation as evidence against a person, without giving to the person at the same time the benefit of the entire residue of what he said on the same occasion.[1]

Confession: effect on accomplices.

A man's confession is evidence against himself only, and not against his accomplices,[2] unless the confession was made in the presence of the accomplice, and when the prisoners were not before a magistrate. When two prisoners are jointly indicted, and are on their trial, and it appears from the opening of the counsel for the prosecution that there is no case against one of them, statements made by that one in the absence of the other, tending to show the guilt of the latter, cannot be given in evidence.

Admission by acquiescence of prisoner in the statement of third persons.

"Admissions may also be implied from the acquiescence of the party. But acquiescence to have the effect of an admission must exhibit some act of the mind, and amount to voluntary demeanor or conduct of the party. And whether it be acquiescence in the conduct or in the language of others, it must plainly appear that such conduct was fully known, or such language fully understood, before any inference can be drawn from his passiveness or silence. The circumstances, too, must be not only such as afforded him an opportunity to act or to speak, but such also as would properly and naturally call for some action or reply from men similarly situated.[3] The *silence* of the party, even where the declarations are addressed to himself, at a time when he is at full liberty to reply as he thinks fit, is, at best, worth very little as evidence of acquiescence; and if he has no means of

[1] *Queen Caroline's case* (1820), 2 B. & B. 294.
[2] 1 Hale, 585 *n.*; *R.* v. *Boroski* (1682), 9 St. Tr. 1.
[3] *R.* v. *Mitchell* (1892), 17 Cox, 503.

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knowing the truth or falsehood of the statement, the fact that he did not in terms deny it is almost valueless.[1] In all these cases it must be distinctly remembered that the statement made in the party's presence or hearing is not evidence against him,[2] but his own conduct in consequence of such statement is the sole evidence."[3]

Admission by prisoner when examined as a witness against other persons.

No admission made, or purporting to be made, by a prisoner on oath, in the course of an examination on a criminal charge *against himself*, can be received in evidence on a subsequent trial.

This rule, though not based on very satisfactory reasoning, is supported by such a current of authority that it must be considered conclusive; but it does not apply to depositions made by a prisoner when examined as a witness against other persons on criminal charges which have several times been admitted against himself; nay, in one case a deposition was admitted by Cockburn, C. J., against a prisoner who had made it before the justices while under examination as a witness, and who, in consequence of its self-incriminatory character, had been committed to take his trial.[4] So upon a charge of manslaughter, the prisoner's deposition on oath, taken by the coroner on the inquest, has been admitted against him on his trial.[5] The rule of exclusion depends not upon the greater or lesser probability that the evidence may be true, but on the policy of the English law, which declares that no man is bound to criminate himself. So, where a witness had on this ground claimed the protection of the court, and had still been illegally compelled to answer, his answers could not be given in evidence against him on a subsequent charge.[6]

[1] *Hayslip* v. *Gymer* (1834), 1 A. & E. 165.
[2] See *Neile* v. *Jakle* (1849), 2 C. & K. 709.
[3] 1 Taylor Ev., 10th ed., 809, 816.
[4] *R.* v. *Chidley & Cummins* (1860), 8 Cox, 365.
[5] *R.* v. *Bateman* (1866), 4 F. & F. 1068.
[6] *R.* v. *Garbett* (1847), 1 Den. 236.

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There are several statutes applicable to frauds and other illegal transactions, which enforce the answers of a witness, even though they tend to criminate himself, but they invariably contain provisions for protecting and indemnifying the witness against the consequences of his evidence.[1]

Privileges of witnesses before a court of inquiry.

Neither the minutes of a court of inquiry, nor any confession, statement, or answer to a question made or given thereat shall be admissible as evidence against the accused, unless the charge is one of making false statements before such court (Adm. Inst. 687a (viii.), and A. L., 20th Oct., 1911). Every person about to make a statement or answer a question likely to incriminate himself should be cautioned by the court that what he is about to state may be made use of against him. All such cautions should be recorded in the minutes [Adm. Inst. 699 (9)]. The proceedings of a court of inquiry should not be produced before a court-martial, though they may be used by the judge-advocate when necessary. [Adm. Inst. 701].[2]

Section V.

The Charge, and the Allegations therein that must be Proved.

Certainty requisite in the charge.

Every offence consists of certain acts done or omitted under certain circumstances; and in the allegations of the charge the offence must appear to be a distinct substantive offence, and the facts and circumstances which form the necessary ingredients of the offence must be concisely set forth; and the offender must be shown on the face of the charge to be within the jurisdiction of the court-martial.

Every charge ought to allege a specific offence[3] con-

[1] See 2 Taylor Ev., 10th ed., 1456, for a collective list of these statutes.

[2] A contrary practice is followed by military courts-martial: Man. of Mil. Law (1907), p. 79.

[3] See, however, p. 156, as to trying officers and crew for loss of ship without a specific charge.

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stituting a breach of a specific enactment; and, subject to certain exceptions, it is of this offence, and of this offence alone, that the person charged can be convicted. The reason for the rule is the unfairness of requiring a person to meet a charge for which he is not prepared. And the exceptions will be found not to conflict with this reason, since they relate either to cases where the distinction between two offences is mainly technical, as where a person charged with felony may, in certain cases, be convicted of a misdemeanor, or a person charged with stealing be convicted of embezzlement, and *vice versâ*. Or they relate to cases where the distinction is one of degree, but not of kind, and the prisoner having been charged with the more serious offence is allowed to be convicted of the less serious.

Under 14 & 15 Vict. c. 100, s. 24, immaterial defects as to statement of time are not fatal to an indictment.[1]

Time and date.

The day and year on which facts are stated in the indictment or other pleading to have occurred, are not in general material; and the facts may be proved to have occurred upon any other day previous to the preparing of the indictment. Where time is of the essence of the offence, as in burglary or the like, the offence must be proved to have been committed at such time; although the day on which the offence is charged to have been committed is immaterial.

Allegations of "time" and "place."

The date, and in certain cases the place, of the offence should be stated,[2] but it is not necessary to prove them as laid where they are not essential to constitute the offence, and may be omitted without affecting the charge. Thus it has been held in the criminal courts that where a defendant was charged in the indictment with having committed arson in the night time, and it was proved

[1] See *R.* v. *Nicholls* (1904), 68 J. P. 432.
[2] *R.* v. *Hollond* (1791), 5 T. R. 607; *R.* v. *Haynes* (1815), 4 M. & S. 214.

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that he committed it in the day time, he was convicted, and the conviction was held good.[1]

So in a similar case before a court-martial under the repealed Act of 22 Geo. II., c. 33, where the prisoner was alleged in the charge to have committed an offence on the morning of a certain day, and the offence was proved on the trial to have been committed on the evening of the same day, the Board of Admiralty was advised that a court-martial had authority, notwithstanding the form of the commission and the charge, to find a prisoner guilty, when it was satisfied that the offence proved was the identical offence set forth in the original complaint, and referred to in the warrant, although there might be a variance from the letter of the charge as to the day, or particular part of the day, when the offence was committed.

In no case is it necessary to state the hour at which the act was done, unless it is rendered essential by the Act upon which the charge is framed.[2] In burglary it is usual to state it, but alleging the offence to have been committed "in the night" without mentioning the hour seems to be sufficient. The almanac is part of the law of England to be judicially noticed.[3] The original almanac was superseded in 1750 by that scheduled to the Style Act.[4]

Test of precision.

The true test of the precision required in the charge is that the offence must be alleged with such certainty that the defendant may be informed of the *identical offence* for which he is to be put on his trial, and may not be prejudiced in his defence by any omission, or imperfect or incorrect statement of the facts necessary to constitute such offence.

Powers of amendment.

It is presumed that a court-martial in considering the allegations of a charge would not be disposed to entertain

[1] *R.* v. *Minton* (1786), 2 East, P. C. 1021.
[2] 2 Hawk. c. 25, s. 76.
[3] *R.* v. *Dyer* (1703), 6 Mod. 41; *Brough* v. *Perkins* (1703), Mod. 681.
[4] 24 Geo. 2, c. 23.

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objections based on technical grounds, but would be guided by the same comprehensive powers of amendment as are applicable to indictments in the ordinary criminal courts.

The Criminal Procedure Act, 1851,[1] s. 1, enacts that whenever on the trial of any indictment [*including inquisitions, informations, and all criminal pleadings*, sec. 30] for any felony or misdemeanor, there shall appear to be any variance between the statement in such indictment and the evidence offered in proof thereof, (*a*) in the name of any county or place, &c., mentioned or described in any such indictment; or (*b*) in the name or description of any person or persons, &c., therein stated or alleged to be the owner or owners of any property, &c., which shall form the subject of any offence charged therein; or (*c*) in the name or description of any person, &c., therein stated or alleged to be injured or damaged, &c., by the commission of such offence; or (*d*) in the christian name or surname, or both, or other description whatsoever, of any person, &c.; or (*e*) in the name or description of any matter or thing whatsoever therein named or described; or (*f*) in the ownership of any property named or described therein, it shall be lawful for the court before which the trial shall be held, if it shall consider such variance not material to the merits of the case, and that the defendant cannot be prejudiced thereby in his defence, on such merits, to order such indictment to be amended, according to the proof by some officer of the court, or other person, on such terms as to postponing the trial as such court shall think reasonable. And sec. 3 enacts that if it shall become necessary at any time, for any purpose whatsoever, to draw up a formal record in any case where any amendment shall have been made under the provisions of this Act, such record shall be drawn up in the form in which

[1] 14 & 15 Vict. c. 100. See chapter on Procedure.

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the indictment was, after such amendment was made, without taking any notice of the fact of such amendment having been made. The amendment must be made before verdict.[1] Where an amendment has once been made there is no power of amending the amendment, or of reverting to the indictment as it originally stood, and the case must be decided upon the indictment in its amended form.[2]

What must be proved.

All facts and circumstances stated in the indictment which cannot be rejected as surplusage must be proved; in other words, all the constituents of the offence. Though if a more serious crime contains, as it were, a less serious one, the prisoner indicted for the former may sometimes be convicted of the latter if the more serious circumstances cannot be established; thus on an indictment for murder, if the malice prepense be not proved, the prisoner may be convicted of manslaughter.

It is sufficient if the evidence agrees in substance with the allegation in the indictment. Thus, a variance in the number of articles, or in their value, is immaterial if the value proved is sufficient to constitute the offence in law. And if ten different species of goods are enumerated, and the prosecutor proves a larceny of any one or more, it will be sufficient, although he fails in his proof of the rest. Allegations as to money, so far as regards the description of the property, are sustained by proof of any amount of coin, or of any bank-note, although the particular species of coin of which such amount was composed, or the particular nature of the bank-note, is not proved.[3]

Words the gist of the offence.

Where words are the gist of the offence, and consequently set out in the indictment, they must be proved as laid; if there be any material variance between the words proved and those laid, even if laid as spoken in the

[1] *R.* v. *Frost* (1855), 24 L. J. M. C. 116.
[2] *R.* v. *Barnes* (1866), 35 L. J. M. C. 204.
[3] 14 & 15 Vict. c. 100, s. 18.

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third person, and proved to have been spoken in the second,[1] or laid as spoken affirmatively, and proved to have been spoken by way of interrogation,[2] or the like, the defendant must be acquitted, unless an amendment be made. But if some of the words be proved as laid, and the words so proved be sufficient to constitute the offence for which the defendant is indicted, failing to prove the remainder of the words will not be material. Where words are laid as an overt act of treason, it is sufficient to prove that the words really used were the same in substance as those laid.

Identity.

Where an *alibi* is pleaded, or the identity of the accused with the person alleged to have committed the crime is in dispute, evidence, direct or circumstantial, of identity is needed. Identification by finger-prints by a person expert in such matters is allowable.[3] So is identification by handwriting, even without the aid of experts.[4]

Intention.

The intention of the party at the time he commits an offence is often an essential ingredient in it, and, in such case, it is as necessary to be proved as any other fact or circumstances laid in the indictment. The intention, however, is not capable of positive proof; it can only be implied from overt acts; and every man is supposed to intend the necessary and reasonable consequences of his own acts.[5] Therefore, if it cannot be implied from the facts and circumstances which, together with it, constitute the offence, other acts of the defendant, from which it can be satisfactorily implied, must be proved at the trial.[6]

Non-essential allegations.

Allegations which are not essential to constitute the offence, and which may be omitted without affecting the charge, or vitiating the indictment, do not require proof,

[1] *R.* v. *Berry* (1791), 4. T. R. 217.
[2] *Barnes* v. *Holloway* (1799), 8 T. R. 15.
[3] *R.* v. *Castleton* (1909), 3 Cr. App. R. 74.
[4] *R.* v. *Smith* (1909), 3 Cr. App. R. 87.
[5] *R.* v. *Dixon* (1814), 3 M. & S. 11; *R.* v. *Farrington* (1811), R. & R. 207.
[6] *R.* v. *Philipps* (1805), 6 East, 464.

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and may be rejected as surplusage.[1] Thus on an indictment for wounding with intent, stating the act to have been done with a stick and kicking, the means were held mere surplusage.[2] And where a defendant was charged in the indictment with having committed arson in the night time, and it was proved that he committed it in the day time, he was convicted, and the conviction was held good.[3] Upon an indictment charging the defendant with giving false evidence in a non-judicial proceeding (which is ordinarily not perjury, but a common law misdemeanor), if such indictment contains an allegation "that so the defendant did commit wilful and corrupt perjury," such allegation may be rejected as surplusage, and need not be proved, and the defendant may be convicted of the common law misdemeanor.[4]

Result of admitting illegal evidence.

Caution is necessary in the evidence adduced for the prosecution, because in criminal cases, if any evidence not legally admissible against the prisoner is left to the jury, and they find him guilty, the conviction is bad, notwithstanding that there was other evidence before them properly admitted and sufficient of itself to warrant a conviction.[5]

The general rule is that nothing may be given in evidence which does not directly tend to be proof or disproof of the matter in issue. It is not competent for the prosecution to adduce evidence to show that the accused has been guilty of criminal acts other than those covered by the indictment for the purpose of leading to the conclusion that the accused is a person likely from his conduct or character to have committed the offence for which he is being tried.[6] Such evidence, where

[1] *R.* v. *Barraclough*, [1906] 1 K. B. 201, 210.
[2] *R.* v. *Briggs* (1831), 1 Moo. C. C. 318.
[3] *R.* v. *Minton* (1786), 2 East, P. C. 1021.
[4] *R.* v. *Hodgkiss* (1869), 39 L. J. M. C. 14.
[5] *R.* v. *Gibson* (1886), 18 Q. B. D. 537.
[6] *Makin* v. *Att.-Gen. for N. S. W.*, [1894] A. C. 57; *R.* v. *Fisher*, [1910] 1 K. B. 149.

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admissible in chief for the prosecution, may be obtained by cross-examination of the defendant, if he elects to give evidence on his own behalf.[1]

Burden of proof.

It is a general rule of the law of evidence that it lies on him who asserts the affirmative of a fact to prove it, and not on him who asserts the negative.

General rule.

The burden of proof is on the prosecution, as a rule. The prosecution must prove their case before the prisoner is called upon for his defence; and this although the offence alleged consists of an act of omission and not of commission, and therefore the prosecution have to resort to negative evidence. The law considers a man innocent until he is shown to be guilty. Though the burden of proof of the charge is in general on the prosecution, yet on particular points it is on the prisoner. Thus, by various Acts of Parliament it is declared penal to do certain things, or possess certain articles, without lawful excuse or authority; such excuse or authority must be proved by the accused: for example, to possess public stores marked with the broad arrow.[2] Again, it lies on the defendant to prove that signals to smuggling vessels were not made for the purpose of giving illegal notice.[3] The burden of justifying his conduct also rests on the defendant in proceedings under the Seamen's Clothing Act, 1869.[4]

Exceptions.

Burden of proof, when shifted.

And not only in the particular cases of which examples have been given, but in most cases of circumstantial evidence, "there is a point (though it is impossible to determine exactly where it lies) at which the prosecutor has done all that he can reasonably be expected to do, and at which it is reasonable to ask for evidence from the prisoner in explanation, and to draw inferences

[1] 61 & 62 Vict. c. 36, s. 1 (f), (i).
[2] 38 & 39 Vict. c. 25.
[3] 39 & 40 Vict. c. 36, s. 190.
[4] 32 & 33 Vict., ss. 4, 5.

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unfavourable to him from its absence."[1] Thus in a case of murdering by poisoning, the court will naturally expect from the prisoner an explanation of the object for which poison was purchased if it is traced to his possession; so also in the case of recent possession of stolen goods. Where it is proved that an unlawful act has been committed, a criminal intention is presumed, and the proof of justification or excuse lies on the prisoner. On the charge of murder the law presumes malice from the act of killing, and throws on the prisoner the burden of disproving the malice by justifying or extenuating the act. On a charge of wilfully maiming or injuring with intent to render unfit for service, the intent will be presumed if it is shown that the act was wilfully done.

In the course of the trial the burden of proof may be shifted from the prosecutor to the prisoner by the proof of facts which raise a presumption of his guilt. Thus A. is accused of stealing a five-pound note. The burden of proof is on the prosecution. He is shown to be in possession of the note soon after the fact. The burden of proof is shifted to A. A. shows that the note was given him in change for a ten-pound note. The burden of proof is shifted back to the prosecution.

Section VI.

Evidence to be confined to the Point in Issue.

Relevancy of evidence.

As a rule, nothing must be given in evidence which does not directly tend to prove or disprove the matter in issue. In criminal proceedings the necessity is stronger, if possible, than in civil, of strictly enforcing the rule, that the evidence is to be confined to the point in issue; for where a prisoner is charged with an offence, it is of

[1] Stephen's General View of Crim. Law, 1890, 303.

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the utmost importance to him that the facts laid before the court should consist exclusively of the transaction which forms the subject of the trial, which alone he can be expected to come prepared to answer. It is therefore a general rule that the facts proved must be strictly relevant to the particular charge, and have no reference to any conduct of the prisoner unconnected with such charge.

Previous or subsequent character and disposition.

The previous or subsequent bad character of the prisoner may not be proved, unless to rebut evidence of good character.[1] The court may, after conviction, for their guidance in determining the sentence, take evidence as to the prisoner's character. On the other hand, the prisoner may during the trial call witnesses to speak generally as to his character, but not to give evidence of particular acts, unless it tends directly to the disproof of some of the facts in issue. In cases in which the previous conduct of the accused may be admissible in proof or in disproof of charges it is open to the prosecution or to the defence to adduce evidence which may be rebutted or cross-examined upon in the course of the trial.[2] The prisoner may put in evidence particular instances where his conduct has been publicly approved by superior officers; or, if a soldier, may call for the defaulters' book to prove that there are no entries against him, or none of a serious character. Witnesses called by the prisoner as to character may be cross-examined either as to particular facts,[3] or as the grounds of their belief, but such a witness cannot be cross-examined as to circumstances of suspicion against the accused arising on the day of the alleged offence.[4] General evidence of good character may he rebutted by general evidence of bad character.[5] And if the prisoner endeavours

[1] *R.* v. *Rowton* (1865), 34 L. J. M. C. 57.
[2] Memo on C. M. p. 30.
[3] *R.* v. *Hodgkiss* (1836), 7 C. & P. 298.
[4] *R.* v. *Rogan* (1846), 1 Cox, 291.
[5] *R.* v. *Rowton* (1865), 34 L. J. M. C. 57.

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to establish a good character either by calling witnesses himself or by cross-examining the witnesses for the prosecution, the prosecutor is at liberty, in most cases, to give proof of the prisoner's previous convictions.[1] And where he is himself called as a witness he may be cross-examined as to his character or previous offences, charges, or convictions, if the proof that he has committed or been convicted of another offence is admissible to prove that he is guilty of the offence charged, or if he has personally or by his advocate asked questions of the witnesses for the prosecution with a view to establish his good character, or has given evidence of his good character, or if the nature or conduct of the defence is such as to involve imputations on the character of the prosecutor or the witnesses for the prosecution, or he has given evidence against any other person charged with the same offence.[2] And apparently the previous conviction can now be put in under 28 & 29 Vict. c. 18, s. 6. Evidence of general good character cannot avail the prisoner against evidence of the fact, but, where some reasonable doubt exists as to his guilt, it may tend to strengthen a presumption of innocence; and where intention is a principal ingredient in the offence, or where presumptive proof only is adduced, evidence as to the character, bearing on the charge, may be highly important, and serve to explain the prisoner's conduct. Nor may it be proved that he has a general disposition to commit the particular kind of offence. On a charge of murder, where malice is of the essence of the crime, expressions of goodwill and acts of kindness by the prisoner towards the deceased are always considered important evidence, as showing what was his general disposition towards the deceased, and leading to the conclusion that his intention could not have been that imputed to him. On a charge of stealing, character

[1] *R.* v. *Gadbury* (1838), 8 C. & P. 676.
[2] 61 & 62 Vict. c. 36, s. 1 (f), (ii.) (iii.).

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for honesty may be entitled to great weight. General character unconnected with the charge, though it may not weigh with the court except in awarding punishment in discretionary cases, may essentially serve the prisoner by influencing the superior with whom it rests to mitigate or remit the sentence. Thus, on a charge of murder, the prosecutor cannot give evidence of the prisoner's conduct in respect to other persons for the purpose of proving a bloodthirsty and murderous disposition. So, on a charge against a sentry of having been asleep on his post on a particular occasion, evidence that he had been found asleep on his post on other occasions would not be admissible for the purpose of showing that he would be likely to commit the offence; and, on a charge of insubordination, evidence of insubordinate conduct on other occasions would not be admissible for the purpose of showing a tendency to insubordinate conduct. But if the evidence is admissible on general grounds as being relevant, it cannot be excluded merely because it discloses other offences.[1] There are, however, exceptions to the rule excluding evidence of other offences: (1) In *treason*, other overt acts may be given in evidence, if they directly prove any overt acts which are laid in the indictment. And in conspiracy, sedition, libel, and similar offences, wide limits are given to the reception of evidence, inasmuch as the offence can only be estimated by the surrounding circumstances.[2] As a foundation for such evidence, however, the existence of the conspiracy must be first proved; secondly, evidence must be given to connect the defendant with the conspirators; and thirdly, it must be proved that the person whose acts are about to be given in evidence was connected with the defendant in the same conspiracy. The prosecutor may, however, either prove the conspiracy, which renders the acts of

Exceptions:—treason, &c.:

[1] *R.* v. *Salisbury* (1831), 5 C. & P. 155.
[2] *R.* v. *Pearce* (1791), Peake, 106.

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guilty knowledge:

the conspirators admissible in evidence, or he may prove the acts of the different parties and so prove the conspiracy.[1] (2) Where it is necessary to prove the *guilty knowledge* of the defendant, evidence may be given of his having committed the same offence on other occasions. Where the gist of the alleged offence is fraud, intent is material, and evidence of other similar offences is admissible to prove the intent.[2] On an indictment for attempting to obtain money by false pretences, evidence is admissible of a previous or subsequent obtaining or attempting to obtain money by the defendant by false pretences, not charged in the indictment, in order to prove that the defendant had a guilty knowledge of the falsehood of the pretence charged in the indictment.[3] Upon an indictment for disposing of and putting away a forged bank-note, knowing it to be forged, the prosecutor may give evidence of other forged notes having been uttered by the prisoner at other times, before or after the commission of the offence for which he is indicted,[4] or that he had other forged notes of the same kind in his possession ;[5] in order to prove, or at least to raise a presumption of, his knowledge that the note in question was forged. So upon an indictment for uttering counterfeit money, it is competent for the prosecutor to prove that other pieces of such counterfeit money were found upon the defendant, or were uttered by him at different times.[6] So, on an indictment for having knowingly and with guilty intent the possession of coining instruments, evidence may be given of the defendant's previously uttering bad money.[7] Under the Prevention of Crimes Act, 1871,

[1] *R.* v. *Lord Lovat* (1746), 18 How. St. Tr. 529.
[2] *R.* v. *Simmonds* (1909), 2 Cr. App. R. 303.
[3] *R.* v. *Francis* (1874), L. R. 2 C. C. R. 128.
[4] *R.* v. *Wylie* (1804), 1 B. & P. (N. R.) 93.
[5] *R.* v. *Hough* (1806), R. & R. 120; *R.* v. *Millard* (1813), R. & R. 245.
[6] *R.* v. *Wylie* (1804), 1 B. & P. (N. R.) 94.
[7] *R.* v. *Weeks* (1861), 30 L. J. M. C. 141.

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in case of stolen goods:

"where proceedings are taken against any person for having received goods knowing them to be stolen, or for having in his possession stolen property, and evidence has been given that the stolen property has been found in his possession, then if such person has, within five years immediately preceding, been convicted of any offence involving fraud or dishonesty, evidence of such previous convictions may be given at any stage of the proceedings, and may be taken into consideration for the purpose of proving that the person accused knew the property which was proved to be in his possession to have been stolen; provided that not less than seven days' notice in writing shall have been given to the person accused that proof is intended to be given of such previous conviction; and it shall not be necessary for the purposes of this section to charge in the indictment the previous conviction of the person so accused."[1] But evidence is not admissible to show that the prisoner within the preceding twelve months had been in possession of certain other property proved to have been stolen, but the possession of which he had parted with before the date of the larceny charged in the indictment. (3) When it is necessary to prove *malice* or *intent* on the part of the defendant, evidence of other offences may be given under some circumstances. Thus, in a trial for murder, evidence of former unsuccessful attempts or threats to murder the same person, and even of the actual murder of other persons by the same means, has been admitted as being relevant to the question whether the prisoner's actions which have been otherwise proved against him have been wilful or accidental.[2] On an indictment for embezzlement, where the embezzlement had been effected by falsifying accounts, the prosecutor was allowed to prove a number of analogous errors in the prisoner's accounts

malice or intent.

[1] 34 & 35 Vict. c. 112, s. 19; *R.* v. *Davis* (1870), L. R. 1 C. C. R. 272.
[2] *Makin* v. *Att.-Gen. for New South Wales* (1894), 63 L. J. P. C. 41.

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for the purpose of proving that the case on which the indictment was founded was not accidental.[1]

Connection of several crimes in one transaction.

Generally speaking, it is not competent to a prosecutor to prove a man guilty of one crime by proving him guilty of another unconnected crime; but where several crimes are connected together, and form part of one entire transaction, then the one is evidence to show the character of the other. In the case of *R.* v. *Whiley*,[2] Lord Ellenborough said he remembered a case where a man committed three burglaries in one night; he took a shirt at one place, and left it at another; and they were all so connected, that the court went through the history of the three different burglaries. So where there were three indictments against the prisoner for setting fire to three ricks belonging to three different persons, and it appeared that the ricks which were in sight of each other were set on fire one immediately after the other, but the strongest evidence being as to the last, that indictment was tried first; the confession of the prisoner relating to all the three ricks, and the evidence of an accomplice as to all, were admitted, as the whole constituted part of the same transaction.[3]

What evidence is relevant.

To the question, what classes of facts "tend immediately" to prove or disprove a charge, or, to use a more technical expression, what facts are "relevant," no direct answer can be given. No precise line can be drawn between "relevant" and "irrelevant" facts. All that can be done is to state certain subordinate rules illustrating the kind of line which experience has induced the courts to draw with respect to particular classes of facts. Common sense must supply the rest. The fact that A. contracted, or dealt in a particular manner with B., is no evidence that he meant to contract or deal in the

Examples.

[1] *R.* v. *Richardson* (1860), 8 Cox, 448.
[2] 1804, 2 Leach, 983.
[3] *R.* v. *Taylor* (1851), 5 Cox, 138.

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same manner with C. But where several offences are so connected with each other as to form part of an entire transaction, evidence of one is admissible as proof of another. On a charge of stealing, for example, though it is not material in general to inquire into any other taking of goods besides that specified in the charge, yet, for the purpose of ascertaining the identity of the person, it is often important to show that other goods which had been upon an adjoining part of the same house and grounds were taken in the same night, and afterwards found in the prisoner's possession. This is strong evidence of the prisoner having been near the owner's house on the night of the robbery; and from that point of view it is material. Thus also, to prove the crime of arson, it may be shown that property which had been taken out of the house at the time of the firing was afterwards found secreted in the possession of the prisoner. So on a charge of desertion, it may be admissible to inquire into the fact of (*not* the facts attending) a highway robbery which had been committed by the prisoner on the night on which he absented himself, and for which he had been tried and convicted by a civil court. The crime of desertion, which is dependent on the intention not to return, might be inferred, in connection with other circumstances, from the commission of a heinous offence; and such collateral evidence is admissible to prove the intention of the accused.

Where intention is a principal issue.

And where intention, knowledge, good or bad faith, malice, or any other state of mind, is a necessary ingredient of the offence charged, the commission of the principal act being either admitted or proved, evidence may, for the purpose of proving the existence of such a state of mind in reference to the particular matter in question, be given of similar acts committed by the accused on different occasions.

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In support of a charge for malicious, disrespectful or unbecoming language, addressed by word of mouth, or written to, or used of, a superior officer at a stated time, or in a particular letter, after having proved the words in the charge, the prosecutor, to show the spirit and intention of the prisoner, may prove also that he spoke or wrote either disrespectful or malicious words on the same subject, either before or afterwards, or that he published or disseminated copies of the letter set forth as disrespectful in the charge. This evidence is admissible, not in aggravation of the crime charged, but for the purpose of proving the deliberate malice or disrespect imputed in the charge; and the prisoner may give in evidence, as negativing a deliberate purpose, or as palliating, though not justifying, his conduct, that he had been provoked to act as he had by the conduct of his superior towards him. So on an indictment for malicious shooting, if it is questionable whether the shooting was by accident or design, proof may be given that at another time the prisoner intentionally shot at the same person. Evidence may be given of other wounds inflicted by the prisoner on other persons at the same time and place for the purpose of identifying the instrument used.[1] On an indictment for embezzlement, where the entries of sums were correct, but the casting up incorrect, a series of similar errors in casting up, both previously and subsequently to the cases to which this indictment referred, were held admissible in order to negative the defence that these were merely accidental errors.[2]

Where the charge is of a nature which makes the intention a principal issue, as where a prisoner is charged with treason, or with a design to undermine the influence of the commanding officer, an inquiry may be allowed

[1] *R.* v. *Crickmer* (1889), 16 Cox, 701.
[2] *R.* v. *Richardson* (1860), 2 F. & F. 343.

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into the conduct and sentiments of the prisoner on particular occasions, but with reference only to the overt act laid or specified in the charge, and to the transactions proved against him. The intention of one particular act may be best evinced by other contemporaneous actions, but great caution is needed to prevent injustice to the prisoner by extending the inquiry to matters wholly unconnected with the charge. It would be the height of injustice to allow such an attack upon him as would involve the necessity of his entering unprepared, and at once, on the defence of every action of his life.

Motive, preparation and subsequent conduct.

Again, where there is a question whether a person committed an offence, evidence may be given of any fact supplying a motive or constituting preparation for the offence, of any subsequent conduct of the person accused, which is apparently influenced by the commission of the offence, and of any act done by him or by his authority, in consequence of the offence. Thus, evidence may be given that after the commission of the alleged crime the prisoner absconded or was in possession of the property, or the proceeds of property, acquired by the crime, or that he attempted to conceal things which were or might have been used in committing the crime, or as to the manner in which he conducted himself when statements were made in his presence and hearing.

In cases of conspiracy, after *primâ facie* evidence has been given of the existence of the plot, and of the connection of the accused therewith, the charge against one conspirator may be supported by evidence of anything done, written, or said, not only by him, but by any other of the conspirators, in furtherance of the common purpose. Thus, on the consideration of a charge of mutiny, or inciting to mutiny, evidence of this kind may, after such *primâ facie* proof, be received against a particular prisoner.

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Acts of several persons in furtherance of a common design.

Where several are proved to be engaged in the same design, the acts and declarations of one in furtherance of that design may be received in evidence against another[1] though not present; and it seems to make no difference as to the admissibility of the act or declaration of a conspirator against a defendant, whether the former be indicted or not, or tried or not with the latter; for the making one a co-defendant does not make his acts or declarations evidence against another any more than they were before; the principle upon which they are admissible at all, is, that the act or declaration of one is that of both united in one common design, a principle which is wholly unaffected by the consideration of their being jointly indicted. The rule applies to all cases where persons act in concert for the commission of crimes, whether as accomplices or co-conspirators. Nor is it material what the nature of the indictment is, provided the offence involve a conspiracy.[2]

Statements of the class above described are admissible as evidence, because they form part of the transaction to which the inquiry relates; they are made in execution of the common purpose. But a statement made by one conspirator, not in execution of the common purpose but in narration of some event forming part of the conspiracy, falls within the rule of hearsay, to which reference has been made in Sec. III., and is not admissible as evidence against another conspirator, unless made in his presence.[3] In consequence of this distinction, the admissibility of writings often depends on the time

[1] Declarations of a prisoner and seditious language used by him are evidence against him to explain his conduct, and the nature and object of a conspiracy charged against him: *R.* v. *Watson* (1817), 2 Stark. (N. P.) 134. Acts and declarations by one conspirator to a stranger not in furtherance of the common object do not fall within the rule: *R. v. Hardy* (1794), 24 St. Tr. 199.

[2] *R.* v. *Stansfield* (1831), 1 Lew. C. C. 118; 2 Stark. Ev., 3rd ed., 329; 2 Russ., 7th ed., 2098.

[3] See *R.* v. *Blake* (1844), 6 Q. B. 126; Stephen, Ev. pp. 6 and 7; Wills, pp. 116 *et seq.*

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when they are proved to be in the possession of fellow-conspirators, whether it was before or after the prisoner's apprehension. Thus, on the trial of Watson for a treasonable conspiracy, some papers, containing a variety of plans and lists of names, which had been found in the house of a co-conspirator, and which had a reference to the design of the conspiracy and were in furtherance of the plot, were held to be admissible as evidence against the prisoner.[1] All the judges were of opinion that these papers ought to be received in the case, inasmuch as there was strong presumptive evidence that they were in the house of the co-conspirator before the prisoner's apprehension, for the room in which the papers were found had been locked up by one of the conspirators. And the judges distinguished the point in this case from that in *R.* v. *Hardy*.[2] In the latter case it was held that papers found in the possession of conspirators with the prisoner, but subsequently to his apprehension, ought not to be read against him, unless there was evidence to show their previous existence, for otherwise there was no evidence that the prisoner was a party to the letters. And it was held that letters directed to the prisoners and intercepted at the post office after their apprehension, were not admissible in evidence against them, as they had never been in the custody of the prisoners, or in any way adopted by them.[3] As in trials for conspiracies, whatever the prisoner may have done or said at any meeting alleged to have been held in pursuance of the conspiracy may be given in evidence against him on the part of the prosecution, so, on the other hand, any other part of his conduct at the same meeting will be allowed to be proved in his behalf; for his intention and design

[1] *R.* v. *Watson* (1817), 32 St. Tr. 1.
[2] (1794), 24 St. Tr. 199.
[3] *R.* v. *Hevey* (1782), 1 Leach, 229.

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at a particular time are best explained by a complete view of every part of his conduct at that time, and not merely from the proof of a single isolated act or declaration.[1]

For the defence.

As other acts and declarations of the prisoner, besides those charged in the indictment, may be given in evidence on the part of the prosecution, so he himself in his defence may in some cases prove other acts and declarations of his own as evidence of his innocence.

Section VII.

The Competency of Witnesses.

Who are competent witnesses.

As a general rule, every person is a competent witness. Formerly persons were disqualified by crime or interest, or by being parties to the proceedings, but these disqualifications have now been removed by statute, and the circumstances which formerly created them do not affect the competency, though they may often affect the credibility, of a witness. If a judge has admitted a witness as competent to give evidence, but upon proof of subsequent facts affecting the capacity of the witness, and upon observation of his subsequent demeanor, the judge changes his opinion as to his competency, the judge may stop the examination of the witness, strike his evidence out of his notes, and direct the jury to consider the case exclusively upon the evidence of the other witnesses.[2] An accessory is a competent witness against his principal, and the principal against the accessory.[3]

Co-defendants.

Where there is no evidence materially affecting one or more of several defendants, it is customary to direct the acquittal of those who are not affected, so as to give an

[1] *R.* v. *Hunt* (1820), 3 B. & Ald. 566.
[2] *R.* v. *Whitehead* (1866), 35 L. J. M. C. 186.
[3] *R.* v. *Patram* (1787), 2 East, P. C. 782; *R.* v. *Haslam* (1786), 1 Leach, 418.

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opportunity to the other defendant or defendants to avail themselves of their testimony. Thus, on the trial of the mutineers of the "Bounty" before a naval court-martial, in 1792, Norman, one of the prisoners, was not materially affected by the evidence for the prosecution, and it was proposed on the part of the other prisoners to take his acquittal, and call him as a witness for the defence. The court-martial refused the application; but on the case being laid before the law officers of the Crown, the Board of Admiralty was advised that the application ought to have been acceded to.[1]

Accused.

A defendant who, being indicted with others, has pleaded guilty, may give evidence against or for his co-defendants, and even a defendant who has pleaded not guilty, if in the course of the trial he withdraws his plea and pleads guilty, or if he is acquitted, can give evidence against or for his co-defendants.[2]

Persons jointly charged.

Formerly persons jointly charged and being tried together were not competent to give evidence either for or against each other. Now a person charged jointly with another is a competent witness, but only for the defence and not for the prosecution. If, therefore, one person charged applies to give evidence, his cross-examination must not be conducted with a view to establish the guilt of the other; and if it be thought desirable to use against one prisoner the evidence of another who is being tried with him, the latter should be released, or a separate verdict of not guilty taken against him. A prisoner so giving evidence is popularly said to turn King's evidence. If a prisoner thinks that the evidence of one or more of the other prisoners proposed to be conjointly arraigned with him will be material to his defence, he should claim a separate trial. It follows

[1] McArthur, 377.

[2] *Wright* v. *Paulin* (1824), Ry. & M. 128; *R.* v. *Gallagher* (1875), 13 Cox, 61.

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Evidence of accomplices.

from what has been stated that the evidence of an accomplice is admissible against his principal, and *vice versâ*, subject, if they are tried together, to what has been just stated. The evidence of an accomplice should always be received with great jealousy and caution. There is no absolute rule of law that the evidence of an accomplice must be corroborated, but there is a well-established rule of practice by which judges advise juries not to convict a prisoner, except in very special circumstances, on such evidence when uncorroborated.[1]

On courts-martial in the navy held to inquire into the cause of the wreck, loss, destruction, or capture of one of his Majesty's ships of war, on which no specific charge is made against any officer, seaman, &c., sec. 92 of the Naval Discipline Act enables all or any of the crew to give evidence, but they are not obliged to criminate themselves. Captain Thrupp's evidence was given in the court-martial held November, 1871, as to the loss of the "Megæra."

Formerly the prisoner in criminal proceedings was not at common law a competent witness either for the prosecution or for the defence on his trial. He could, however, make a statement not on oath, and he still can do this instead of giving evidence.

Accused as a witness.

By the Criminal Evidence Act, 1898,[2] every defendant is now a competent witness for the defence at every stage of criminal proceedings, either on his own behalf or on behalf of any person who is tried along with him, but he cannot be called as a witness except upon his own application, and he cannot therefore be compelled against his will to give evidence for a co-defendant. The defendant gives his evidence, like other witnesses,

[1] *R.* v. *Tate* (1908), 1 Cr. App. R. 39.

[2] 61 & 62 Vict. c. 36, s. 1. The provisions of this Act are applied to naval courts-martial, by Adm. Inst., Art. 689 (2).

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on oath or affirmation, and from the witness-box or other place from which the other witnesses give their evidence, unless otherwise ordered by the court. The prisoner is to be distinctly told by the deputy judge advocate that he has a right to give evidence on his own behalf. If a defendant called on his own behalf inculpates by his evidence a co-defendant, he is subject to cross-examination on behalf of the defendant so inculpated.[1] The failure of any person charged with an offence, or of the wife or husband, as the case may be, of the person so charged, to give evidence must not be made the subject of any comment by the prosecution. Where the only witness as to the facts of the case called by the defence is the person charged, he shall be called as a witness immediately after the reading of his written "Defence" or the delivery of his verbal reply. In cases where the right of reply by the prosecution depends upon whether evidence has been called for the defence, the fact that the person charged has been called as a witness shall not of itself confer on the prosecution the right to reply.[2]

What questions a prisoner may be asked.

Where the prisoner offers himself as a witness he may be asked any question in cross-examination, notwithstanding that it would tend to criminate him as to the offence charged. But he may not be asked, and if he is asked must not be required to answer, any question tending to show that he has committed, or been convicted of, or been charged with, any other offence, or is of bad character unless (i.) The proof that he has committed or been convicted of the other offence is admissible evidence to show that he is guilty of the offence with which he is then charged; or (ii.) He has personally, or by his advocate, asked questions of the witnesses for the prosecution, with a view to establish his own good character, or has given evidence of his good

[1] *R.* v. *Haduen*, [1902] 1 K. B. 882.
[2] 61 & 62 Vict. c. 36, s. 3.

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character, or the nature or conduct of the defence is such as to involve imputations on the character of the prosecutor or the witnesses for the prosecution; or (iii.) He has given evidence against any other person charged with the same offence. A prisoner may not be asked questions tending to criminate his wife. Evidence tending to show that the prisoner has been guilty of criminal acts other than those covered by the charge is not admissible, except on the issue whether the acts charged against the accused were designed or accidental, or except for the purpose of rebutting a defence otherwise open to him. A husband is not compellable to disclose any communication made to him by his wife during marriage; and a wife is not compellable to disclose any communication made to her by her husband during marriage.[1]

Prisoner and wife.

Previous to the Criminal Evidence Act, 1898, it was also the general rule that husband and wife could not give evidence either for or against each other. An exception was of necessity admitted in the case of offences committed by either husband or wife against the person or liberty of the other. And as in the case of the rule by which the accused himself was held incompetent, there were also a number of statutory exceptions. Thus, under the Army Act, 1881, on a charge against a person of illegally purchasing from a soldier any regimental necessaries and equipment and stores, the accused "and the wife or husband of such person may, if he or she think fit, be sworn and examined as an ordinary witness in the case." The Explosives Substances Act, 1883, by sec. 4 (2) enacts, that in any proceeding under sec. 4 the accused person and wife or husband may give evidence.

Prisoner's wife.

The wife of a person charged is now a competent witness, but except in certain special cases:—(i.) She

[1] 16 & 17 Vict. c. 83, s. 3; Crim. Evid. Act, 1898, s. 1.

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can give evidence for the defence only; and (ii.) she can give evidence only if her husband applies that she should do so. The special cases in which a wife can be called as a witness either for the prosecution or for the defence, and without the consent of the person charged, are where the prisoner is charged with an offence under secs. 48 to 55 of the Offences against the Person Act, 1861, or under the Criminal Law Amendment Act, 1885, and cases in which the wife is by common law a competent witness against her husband—*i.e.*, where the proceeding is against the husband for bodily injury or violence inflicted on his wife. Any conversation between husband and wife may be proved by third persons who were present at or overheard it.[1] And it has been held that any statement made by the wife to a third person in the presence of the prisoner may in like manner be proved.[2]

Lunatics. Lunatics, that is, persons usually mad, are incompetent; but if they have intervals of reason, during these lucid intervals they will be competent.

So a monomaniac will be an admissible witness, if the court finds upon investigation that he is aware of the nature and sanction of an oath, and that he is capable of understanding the subject to which he is required to testify.

Drunken persons. In the case of drunkenness, the return of sobriety will render the witness competent.

Infants. An infant of any age may be a witness, provided such infant appears sufficiently to understand the nature and moral obligation of an oath; for its competency depends not upon its age, but its understanding.[3] There are several cases in which the evidence of a child of tender years who is offered as a witness, and who, in the opinion

[1] *R.* v. *Smithies* (1832), 5 C. & P. 332; *R.* v. *Simmons* (1834), 6 C. & P. 540.

[2] *R.* v. *Mallory* (1884), 53 L. J. M. C. 134.

[3] *R.* v. *Powell* (1771), 1 Leach, 110; *R.* v. *Williams* (1836), 7 C. & P. 320.

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of the court, does not understand the nature of an oath, may be received, though not given upon oath, if the court is satisfied that the child is of sufficient intelligence to justify the reception of the evidence, and understands the duty of speaking the truth; but to justify a conviction such evidence must be corroborated by other material evidence.

Mutes and deaf persons.

A witness unable to speak or hear is not incompetent, but may give his evidence by writing or by signs, or in any other manner in which he can make it intelligible, but such writing must be written and such signs made in open court. Evidence so given is deemed to be oral evidence.

Creed.

The particular form of the religious belief of a witness, or his want of religious belief, does not affect his competency. If he takes an oath he may take it with such ceremonies and in such manner as makes it binding on his conscience. If he objects to take an oath on the ground that he has no religious belief, or that taking an oath is contrary to his religious belief, he may make a solemn affirmation.[1]

Privileged communications.

But any form of oath, absolute as it may seem, must be taken with an implied reservation, that the witness is not to disclose any facts within his knowledge which, by the law of the land, founded on considerations of justice and of public policy, he is forbidden to make known. Of such a nature are professional communications between a client and his solicitor, or counsel, and matters connected with the government of the country. A witness must not be asked, nor if asked must he answer, any question which tends to elicit the fact whether the verdict of a previous court-martial was unanimous or not. [War Office Order, Jan. 2nd, 1901.]

[1] 51 & 52 Vict. c. 46, and 9 Edw. 7, c. 39; Adm. Inst., 679; C. M. Memo. 36.

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On similar grounds the official transactions between the heads of the departments of Government and their subordinate officers are in general treated as secrets of State. Thus communications between a colonial governor and his attorney-general on the condition of the colony or the conduct of its officers, or between such governor and a military officer under his authority; the report of a military commission of inquiry made to the commander-in-chief; the free communications by a commander of his real opinions as to the conduct, qualifications, or fitness for any particular duty of any officer under his command,[1] are confidential and privileged matters which the interest of the State will not permit to be revealed.

As a rule it is for the court to decide whether the permission of any such question would or would not, under the circumstances of the particular case, be injurious to the administration of justice.

Medical men and clergymen are not privileged from the disclosure of communications made to them in professional confidence, but it is not usual to press for the disclosure of communications made to clergymen.

The question, whether answered or not, should be entered on the proceedings. When the witness claims the privilege of not answering, it is for the court to decide whether the question is within any of the exceptions. In their discretion courts-martial may also interpose by informing a witness, at the time when a question is put to him, that he is not bound to answer. Any such interposition, and any claim of privilege by the witness, and the fact whether the witness is required to answer or not, should be noted on the proceedings.

Competent not necessarily compellable witness.

Although a person may be a competent witness it does not necessarily follow that he is a compellable witness. No one except the prisoner himself when giving evidence

[1] *Dawkins* v. *Lord Paulet* (1869), 5 L. R. Q. B. 115.

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on his own application, and as to the offence wherewith he is charged, is bound to answer a question if the answer would, in the opinion of the court, have a tendency to expose the witness, or the wife or husband of the witness, to any criminal charge, penalty, or forfeiture. Accordingly, an accomplice cannot be examined without his consent; but if an accomplice who has come forward to give evidence on a promise of pardon, or favourable consideration, refuses to give full and fair information, he renders himself liable to be convicted on his own confession. However, even accomplices in such circumstances are not required to answer on their cross-examination as to other offences.

Section VIII.

The Examination of Witnesses.

Examination in chief.

On an examination in chief, a witness must not be asked leading questions. The simple meaning of this rule is that a party who calls a witness to prove a case must not suggest answers to the witness, nor frame his questions in such a manner that the witness by answering merely "Yes" or "No" shall give the reply and the evidence which the party wishes to elicit. A question is said to be leading when the words which the witness is expected and required to utter are put into his mouth, or when it suggests to the witness the answer which the examiner wishes or expects it to have; and such a question is inadmissible, because the object of calling witnesses and examining them *vivâ voce* in open court is that the judge and jury may hear them tell their own unvarnished tale of the circumstances which they are called to attest. If, therefore, a party or his counsel were allowed to put a question to their own witness which the latter might answer by a mere affirmative or negative, it is apparent that the evidence would be

Leading questions not to be put.

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the statement of the party, and not that of the witness. Such a course would strike radically at the credibility of all oral evidence, and therefore it is a sound and established rule that, on the examination in chief, leading questions must not be asked. The rule may be exemplified thus: A. B. is charged with stealing a watch, the property of C. D. E. F. saw A. B. take the watch from the counter in C. D.'s shop. Now, if the counsel for the prosecution, in order to prove the theft, were to call E. F., and ask him whether at such a time he saw A. B. enter C. D.'s shop, and take the watch from the counter, it is plain that such a question would be leading, because it would at once suggest to the witness the answer which he was expected to make, and the prisoner would be convicted by an answer simply in the affirmative. The answer to the latter branch of the question involves the whole question of guilt, and the substance of the charge. The witness ought therefore to be asked, not whether he saw the prisoner commit the offence, but what he saw the prisoner do at the time when, and at the place where, it is alleged that the offence was committed. Questions are not objectionable as leading questions while the examination is only introductory to what is material. Thus, in theabove example it would be quite proper, for the purpose of saving the time of the court, to ask the witness whether at a specified time he entered C. D.'s shop, and even whether at that time he saw the prisoner there and near the counter. Such questions are quite immaterial, and may therefore be put in the shortest and most direct manner possible, because the answer cannot inculpate the prisoner in any degree. But when the real issue is approached, and when it is sought to fix the guilt on the prisoner, the witness must be asked not whether he saw the prisoner do a certain act, but what he saw the prisoner do. Such a course of examination is clearly necessary to prevent,

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at least in some measure, the possibility of collusion between a prosecutor or a party and his witness.[1] In examination in chief a witness must be asked only questions of fact which are relevant and pertinent to the issue; and he may not be asked irrelevant questions, or, except under circumstances to be presently mentioned, questions as to his own inferences from or personal opinion of facts uttered by the former witness.[2]

Leading an adverse witness.

If a witness should appear to be in the interest of the opposite party, or unwilling to give evidence, the court may deem it right to relax the rule against leading questions, and allow the examination in chief to assume something of the form of a cross-examination. It is entirely in the discretion of the court to determine how far it will allow the examination in chief to be by leading questions.[3] Thus, where an issue had been directed by the Court of Chancery with power to examine the parties, Chief Justice Best held that the defendant stood in a situation which of necessity made him adverse to the plaintiff, by whom he was called, and that the counsel for the plaintiff might, as a matter of right, cross-examine him.[4] But in general, the fact of a witness being an unwilling or adverse witness is to be ascertained by the nature of his evidence, his manner of answering, and his demeanor, before the unrestricted power of leading can be given. It is not enough, for instance, in a prosecution, that the witness is intimate with the prisoner, or that he has been informed against by the prosecutor, to justify the counsel in beginning at once with the cross-examination.

After the examination in chief is closed, the other party is at liberty to proceed to cross-examination, without regard

[1] Powell on Ev. 424.
[2] *Post*, 403.
[3] 2 Russ., 7th ed., 2306.
[4] *Clarke* v. *Saffery* (1824), Ry. & M. N. P. R. 126; Russ. iii. 599.

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generally to the rule restricting examinations in chief in respect to leading questions. In *Bastin* v. *Carew*,[1] Chief Justice Abbott allowed the cross-examination of an adverse witness, and said, "I mean to decide this, and no further —that in each particular case there must be some discretion in the presiding judge as to the mode in which the examination shall be conducted, in order best to answer the purposes of justice."[2] Upon cross-examination the interrogator cannot assume that the witness has made an assertion in his examination in chief which was not in fact made, or put a question which assumes a fact not in proof.

Witnesses for the prosecution.

It has been fully settled that the prosecution is not bound to call every witness summoned, but may call what witnesses it thinks proper. The prosecutor, however, ought to cause the witnesses to be in attendance, because the prisoner may have neglected to bring them himself in consequence of their being summoned by the prosecution. [Adm. Inst., No. 682 (6).] In the note to Rule 75 of Procedure for Military Courts-martial, it states that "as the cross-examination of a witness for the prosecution may be most material for the purposes of defence, a prosecutor should always have all his witnesses present. Failure to produce a material witness for cross-examination might invalidate the proceedings."

When a witness who is not examined by the prosecution is called by the prisoner, he must be considered his witness as much as those summoned by him. As the witness is considered to be the prisoner's witness in such a case, it follows that the prosecution may impeach his evidence in the same manner as if he had been called by the prisoner in the usual way; but the question how far a party is at liberty to discredit his

[1] (1824), Ry. & M. N. P. R. 127.
[2] *R.* v. *Chapman* (1838), 8 C. & P. 558, Lord Abinger, C. B.; *R.* v. *Murphy* (1837), 8 C. & P. 297, Coleridge, J.

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Contradiction of an adverse witness.

own witness has been settled, as regards the superior courts, by the following salutary enactment, embodying a rule of practice which a court-martial would do well to follow under similar circumstances. "A party producing a witness shall not be allowed to impeach his credit by general evidence of bad character, but he may, in case the witness shall, in the opinion of the judge, prove adverse,[1] contradict him by other evidence, or, *by leave of the judge*, prove that he has made at other times a statement inconsistent with his present testimony; but before such last-mentioned proof can be given, the circumstances of the supposed statement, sufficient to designate the particular occasion, must be mentioned to the witness, and he must be asked whether or not he has made such statement."[2]

When a witness may refresh his memory by notes.

Though a witness can testify only to such facts as are within his own knowledge and recollection, he is sometimes permitted to *refresh* and assist his *memory by the use of a written* instrument, memorandum or entry in a book. But this course, excepting in the case of scientific witnesses referring to professional books as the foundation of their opinions, can only be adopted where the writing has been made, or its accuracy recognized, at the time of the fact in question, or at furthest, so recently afterwards as to render it probable that the memory of the witness had not then become defective.[3] The general rule is that a witness, to assist his memory, may use a written entry if it were made by himself shortly after the occurrence of the facts to which it relates; but if he cannot speak to the fact from recollection, any further than as finding it entered in a book or paper, such book or paper ought to be produced, and if not evidence, the testimony of the witness amounts to

[1] "Adverse" means "hostile," not "unfavourable": *Greenhough* v. *Eccles* (1859), 28 L. J. C. P. 160.

[2] 17 & 18 Vict. c. 125, s. 22. See Inadmissible Evidence, v., C. M. Memo. 39.

[3] 2 Russ., 7th ed., 2303.

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nothing.[1] Although in general the entries ought to have been made by the witness himself, yet if another wrote them, and the witness regularly examined them from time to time, soon after they were written, and while the facts stated in them were fresh in his recollection, he may refresh his memory by referring to them, as if he had written them with his own hand. When, therefore, a witness had attended Chartist meetings for the purpose of obtaining information and communicating it to the Government, and within two hours after each meeting he detailed such information to an inspector, who took it down from his dictation, and some of the accounts were read over to him and some he read over himself, and he often saw what the inspector wrote, but did not see all, and he signed all the papers, and the inspector proved that he took down what the witness said as nearly as possible, and read the whole over to the witness, it was held that the witness might refresh his memory by these papers. If he could say that when his mind was so full of the circumstances he ascertained that the paper correctly detailed them, it was immaterial whether he ascertained it by looking at the paper himself or by having it read over correctly by another person.[2] So where a captain produced the ship's log, which was written by the mate, who was absent, but he had himself read the log about a week after it was written, when the matters contained in it were fresh in his mind, and he then thought it correct, it was held that he might refresh his memory by it.[3]

It is not essential that the memorandum should have been contemporary with the fact; it seems to be sufficient if it has been made by the witness, or by another with his privity, at a time when the facts were fresh in the

[1] *Doe* v *Perkins* (1790), 3 T. R. 749.
[2] *R.* v. *Mullins* (1848), 3 Cox, C. C. 526, Maule and Wightman, JJ.
[3] *Anderson* v. *Whalley* (1852), 3 Car. & K. 54, Talfourd, J. See *R.* v. *Stokes* (1850), 4 Cox, C. C. 451.

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recollection of the witness, and that the reading of such memorandum restores the recollection of the fact which has faded, in the memory, or enables him to swear to the truth of the fact.[1] When a witness refreshes his memory from memoranda, it is always usual, and very reasonable, that the adverse counsel should have an opportunity of looking at them when he is cross-examining the witness.[2] But if a paper is put into a witness's hands merely to prove a handwriting, the other side have no right to see it. If a counsel, in cross-examination, put a paper into the witness's hand to refresh his memory, the opposite counsel has a right to look at it, without being bound to read it in evidence. And he may also ask the witness when it was written, without being bound to read it.[3]

Use of party's notes by opposite party.

Testimony of opinion.

On some particular subject, positive and direct testimony may often be unattainable; and in such cases a witness is allowed to testify as to his *belief* or *opinion*, or even to draw *inferences* respecting the fact in question, from other facts, provided these last facts are within his personal knowledge. Nor is this course fraught with much danger; because a witness who testifies falsely as to his *belief* is equally liable to be convicted of perjury with the man who swears positively to a fact which he knows to be untrue. In conformity with this rule, which admits evidence of opinion on the ground of necessity, witnesses are constantly permitted to express their belief respecting the identity of persons and things, as also respecting the genuineness of disputed *handwriting*.

Skilled witnesses.

This lax mode of examination chiefly prevails on questions of science, or trade, where, from the difficulty, and occasional impossibility, of obtaining more direct and positive evidence, persons of skill, sometimes called *experts*,

[1] 1 Stark. Ev. 177; 2 Phill. Ev. 414.
[2] *Hardy's case* (1794), 24 How. St. Tr. 824.
[3] *R.* v. *Ramsden* (1827), 2 C. & P. 604.

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are allowed not only to testify to facts, but to give their opinion on the evidence. Thus the opinions of medical men are constantly admitted as to the cause of disease or death, or the consequences of wounds, or the treatment of sickness; and as to the sane or insane state of a person's mind, as collected from a number of circumstances, and as to other subjects of professional skill. So the opinions of experienced officers are taken respecting questions of military practice.[1] In short, it may be laid down as a general rule that the opinion of witnesses possessing peculiar skill is admissible whenever the subject-matter of inquiry is such that inexperienced persons are unlikely to prove capable of forming a correct judgment upon it without such assistance; in other words, when it so far partakes of the character of a science or art as to require a course of previous habit or study in order to obtain a competent knowledge of its nature.

The opinions of scientific witnesses are admissible in evidence, not only where they rest on the personal observation of the witness himself, and on facts within his own knowledge, but even where they are merely *founded on the case*, as *proved by other witnesses on the trial.* Thus, in an action for unskilfully navigating a ship, a Master of the Trinity House, or other nautical witness, may be asked what judgment he can form with respect to the proper or improper navigation of the ship, *assuming the facts stated in evidence to be true.* So upon a question of sea-worthiness, experienced shipwrights have frequently been called to give an opinion as to whether a ship in the state in which the one in question was sworn to be on a certain day of the voyage, could have been sea-worthy when the policy was effected.[2] Also on a question whether a particular act for which a prisoner is on his trial were an act of insanity, a medical

[1] *Bradley* v. *Arthur* (1825), 4 B. & C. 295.
[2] 2 Taylor Ev., 10th ed., 1417—1425.

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man conversant with that disease, who knows nothing of the facts, but has simply heard the trial, cannot be broadly asked his opinion as to the state of the prisoner's mind at the time of the commission of the alleged crime; because such a question involves the determination of the truth of the facts deposed to, as well as the scientific inference from these facts.[1] Where, indeed, the facts are admitted, or not disputed, and the question becomes substantially one of science only, it may be convenient to allow the question to be put in the general form just mentioned, though it cannot be insisted on as a matter of right. The proper and usual form of question is to ask him whether, assuming such and such facts, the prisoner was sane or insane?

Foreign laws must be proved by experts.

In conformity with the general rule, which admits in evidence the opinions of skilled witnesses on all subjects of science, the existence and meaning of *the laws*, as well written as unwritten, and of the usages and customs of *foreign states*, may, and indeed *must*, be proved by calling professional or official persons to give their opinions on the subject.[2]

Evidence of accomplices.

It remains only to mention the examination of *accomplices*, whose testimony is admitted from necessity, it being often impossible, without having recourse to such evidence, to bring the principal offenders to justice. The *degree of credit* which ought to be given to the testimony of an accomplice, is a matter exclusively within the province of the court. It has sometimes been said that the court ought not to believe him, unless his testimony is corroborated by other evidence, and, without doubt, great caution in weighing such testimony is dictated by prudence and reason. But though no positive rule of law exists on the subject, it has become the settled course of practice in the ordinary criminal

[1] *M'Naghten's case* (1843), H. L.
[2] 2 Taylor Ev., 10th ed., 1424—1425.

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courts for the judge to advise the jury not to convict a prisoner upon the sole and *uncorroborated* testimony of an accomplice.

Cross-examination.

After the examination in chief is closed, the other party is at liberty to proceed to cross-examination, without regard generally to the rule restricting examinations in chief with respect to leading questions; neither is he confined to the evidence given in the examination in chief. This right is discretionary, and when the examination in chief has resulted in clear, conclusive, or unimpeachable evidence, it will be prudent for the adverse party not to claim his privilege; for cross-examination in such a case, instead of weakening the evidence, generally strengthens and confirms it. So where the adverse party does not dispute the truth of his opponent's case, but relies on a justification or an excuse, he will not think it desirable generally to cross-examine a witness. As the object of the examination in chief is to lay all the material evidence of a case before the court, so the objects of cross-examination are to impeach the accuracy, credibility, and general value of that evidence; to sift, detect, and expose discrepancies or to elicit suppressed facts, which weaken or qualify the case of the examining party, and support the case of the cross-examining party. It is, therefore, generally a rule that on cross-examination an adverse witness may be asked leading questions. Great latitude is allowed as to the questions which a party is permitted and entitled to ask in cross-examination, and he will seldom be stopped by the court unless the question is manifestly irrelevant to the case, and calculated neither to qualify the examination in chief, nor to impeach the credit of the witness. It is manifest that questions which would be clearly irrelevant on the examination in chief, may be of the highest importance when asked in cross-examination. The cross-examination

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is not limited to the matters upon which the witness has already been examined in chief, but extends to the whole case.[1] Consequently, if a plaintiff calls a witness to prove the simplest fact connected with his case, the defendant is at liberty to cross-examine him on every issue, and by putting leading questions, to establish, if he can, his entire defence; and this doctrine has been carried so far that even a person who is the substantial party in the cause, called by his adversary for the sake of formal proof only, is thereby made a witness for all purposes, and may be cross-examined as to the whole case.[2] Witnesses called by the judge, and not by either party, may not be cross-examined without the judge's permission;[3] but it is usual to give to a party adversely affected by the evidence of such witness leave to cross-examine.[4]

It is difficult to lay down, or rather to apply, any precise general rule for cross-examination. Still the following subsidiary rules have been clearly established, which in a great measure point out the limits within which questions on cross-examination must be confined.

1st. No question respecting any fact *irrelevant to the issue* can be put to a witness on cross-examination for the mere purpose of *impeaching his credit by contradicting him;* but if any such question be inadvertently put and answered, the *answers* of the witness will be *conclusive*.

Impeachment of the character of a witness.

2ndly. With the view of *impeaching* the *character* of a witness, he may always be asked on cross-examination questions with regard to alleged *crimes*, or other improper conduct on his part; though he is not obliged to answer questions, the answers to which have a tendency to expose him to a penalty, or to any kind of punishment,

A witness is not obliged to criminate himself.

[1] *Mayor and Corporation of Berwick-on-Tweed* v. *Murray* (1850), 13 Jur. 1063.
[2] *Morgan* v. *Brydges* (1818), 2 Stark. N. P. 314.
[3] *Coulson* v. *Disborough*, [1894] 2 Q. B. 316.
[4] *R.* v. *Cliburn* (1898), 62 J. P. 232.

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or to a criminal charge (as, for instance, if he be asked whether he has been guilty of theft, fraud, or any offence subjecting him to a criminal proceeding); and here, if the fact inquired into be relevant to the issue, it may be proved by other evidence, although denied by the witness; but if it be irrelevant, the answer of the witness, if he make any, must be regarded as conclusive, and whether he answers or not, no independent proof can be given to establish the truth of the imputation, except in the case of a previous conviction for felony or misdemeanor.

It is enacted by 28 Vict. c. 18, s. 6, that "A witness may be questioned as to whether he has been convicted of any felony, or misdemeanor, and upon being so questioned if he either denies, or does not admit the fact, or refuses to answer, it shall be lawful for the cross-examining party to prove such conviction; and a certificate containing the substance and effect only (omitting the formal part) of the indictment and conviction for such offence, purporting to be signed by the clerk of the court, or other officer having the custody of the records of the court where the offender was convicted, or by the deputy of such clerk or officer, shall upon proof of the identity of the person be sufficient evidence of the said conviction, without proof of the signature or official character of the person appearing to have signed the same."

Impeachment of the credit of a witness.

3rdly. With respect to all questions put to a witness on cross-examination for the purpose of directly testing his credit, it may be broadly laid down that, if the questions relate to relevant facts, the answers may be contradicted by independent evidence; if to irrelevant, they cannot. Thus it is enacted, by 28 Vict. c. 18, s. 4:

Proof of former statement.

"If a witness, upon cross-examination as to a former statement made by him relative to the subject-matter of the indictment or proceedings, and inconsistent with his

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present testimony, does not distinctly admit that he has made such statement, proof may be given that he did in fact make it; but before such proof can be given, the circumstances of the supposed statement sufficient to designate the particular occasion must be mentioned to the witness, and he must be asked whether or not he has made such statement." This enactment is limited to statements relative or in some way relevant to the subject-matter of the trial. It does not prescribe or limit what may be asked, but only as to what matters contradictory evidence may be given. In the case of questions purely collateral to the issue the cross-examining party must take the answer of the witness, and although the questions go to the credit of the witness, may not contradict him. Thus, if a witness has been examined in chief as to some transaction supposed to have occurred between certain persons, and should admit that he had heard of such a thing, but does not know its cause, it would be irregular to prove his having made a declaration respecting the cause in order to show his knowledge of the cause without first asking him in the cross-examination whether he had not made such a declaration, or if he had answered that he did not remember the transaction, it would be equally irregular, without such previous cross-examination, to prove declarations made by him respecting the transaction, for the purpose of showing that he must have remembered it;[1] for it would in many cases have an unfair effect upon the witness and upon his credit, and would deprive him of that reasonable protection which it is the duty of the court to afford to every person who appears as a witness, to allow proof of his former conversation without first interrogating him as to that conversation, and reminding him of it in order to call up all the powers of his memory

[1] *Queen Caroline's case* (1820), 2 B. & B. 299.

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as to the transaction.[1] The same rule applies to previous statements in writing. Sec. 5 enacts that "A witness may be cross-examined as to previous statements made by him in writing or reduced into writing relative to the subject-matter of the indictment or proceeding, without such writing being shown to him: but if it is intended to contradict such witness by the writing, his attention must, before such contradictory proof can be given, be called to those parts of the writing which are to be used for the purpose of so contradicting him: Provided always, that it should be competent for the judge, at any time during the trial, to require the production of the writing for his inspection, and he may thereupon make use of it for the purposes of the trial as he may think fit."

Under sec. 5 a witness may be cross-examined upon a letter or other statement, made by him in writing without reading it or putting it in as evidence. If a witness refreshes his memory from entries in a book, counsel may cross-examine on those entries without making them his evidence, and the jury may see them if they think fit; but if counsel cross-examines as to other entries in the same book, he makes them his evidence.[2] If a cross-examining counsel puts a paper into the hands of the witness, and puts questions on it, and anything comes of those questions, his opponent has a right to see the paper, and re-examine on it; but if the cross-examination founded on the paper entirely fails and nothing comes of it, his opponent cannot demand to see the paper.[3]

It becomes then necessary to ascertain what matters connected with the witness are or are not relevant; and here, in addition to what has been already stated, it

[1] 2 Russ., 7th ed., 2313.
[2] *Gregory* v. *Taverner* (1833), 6 C. & P. 281.
[3] *R.* v. *Duncombe* (1838), 8 C. & P. 369.

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should be observed that inquiries respecting the previous conduct of the witness will almost invariably be regarded as irrelevant, provided such conduct be not connected with the cause or the parties. Therefore, if a witness be questioned on cross-examination respecting the commission of crimes by him on some former occasion, his answers, except in the case of an actual conviction, must be taken as conclusive. This rule is founded on two reasons: first, that a witness cannot be expected to come prepared to defend all the actions of his life; and next, that to admit contradictory evidence on such points would of necessity lead to inextricable confusion by raising an almost endless series of collateral issues.[1]

Still the credit of a witness may be impeached by evidence reflecting on his character for veracity, and witnesses may be called to prove that they would not believe him on his oath; but the questions must be limited to general reputation, and evidence of particular facts will not be admissible.[2]

Re-examinations.

After a witness has been cross-examined, the party who called him has *a right to re-examine* him, and to ask all questions which may be proper to draw forth an *explanation* of the meaning of the expressions used by the witness on cross-examination, if they be in themselves doubtful; and also of the motive, or provocation, which induced the witness to use those expressions; but he has no right to go further, and to introduce matter new in itself, and not suited to the purpose of explaining either the expressions or motives of the witness.

By prosecutor.

Whenever evidence of new matter is adduced on the part of the defence, which the prosecutor *could not foresee*, he will be entitled to give evidence in reply to contradict it, but will be confined exclusively to the *new points* introduced by the prisoner.[3]

[1] 2 Taylor Ev., 10th ed., 1439.
[2] *R.* v. *Brown* (1867), L. R. 1 C. C. R. 70.
[3] *R.* v. *Frost* (1840), 9 C. & P. 159.

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But the court has always a discretionary power of recalling witnesses at any stage of the trial, and putting such legal questions to them as the exigencies of justice require. By court.

The evidence of a single witness, if believed, is sufficient to support a charge. But the value of testimony depends on manifold considerations: for instance, the opportunities of seeing and hearing, previous familiarity with the subject-matter of the question, acquaintance with all the surrounding circumstances of the transaction, professional knowledge touching matters of professional experience, the interest of the witness as affecting the bias of his mind, the position, and character for veracity, the intelligence, demeanour and manner of the witness (especially when under cross-examination), the substantial coincidence of the evidence with other circumstances in the case; in truth, all the complicated network of facts which interlaces the ordinary texture of human life must, as different points arise, be carefully unravelled by every judicial tribunal. The same reasoning applies when the court is called upon to strike the balance between conflicting evidence; and it must always be remembered that slight discrepancies are proofs of veracity, rather than the contrary; one eye-witness scarcely ever sees a transaction *precisely* in the same light or reports it in the same words as another. Paley justly states that "the usual character of human testimony is substantial truth under circumstantial variety." On the other hand, facts coincident in every particular recounted by two witnesses in coincident terms, savour of preconcerted falsehood; for absolute consistency and minute agreement in details induce a strong suspicion of confederacy and fraud. The principle on which the credibility of human evidence must be determined has been well defined by Bishop Butler: Evidence of a single witness. Comparative value of testimony.

"Probable evidence in its very nature affords but an

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imperfect kind of information; and is to be considered as relative only to beings of limited capacities. For nothing which is the possible object of knowledge, whether past, present, or future, can be probable to an infinite intelligence; since it cannot but be discerned absolutely as it is in itself, certainly true, or certainly false. But to us, *probability is the very guide of life.*"

Section IX.

Written Evidence.

1. *Public Documents.* 2. *Private Documents.*

General rule.

The general rule is that the contents of a written instrument can only be proved by the production of the instrument itself. This rule is subject to many exceptions. When evidence of an inferior nature, whether by parol or copy, is admissible in proof of the contents of a written instrument, it falls within the definition of secondary evidence—a term almost exclusively applied to evidence of this description, although in its general import of wider signification. The courts are said to take judicial notice, in other words not to require evidence, of any facts which are so generally known as not to require special proof. The courts must recognize without proof the common and statute law; the law of nations; the law and custom of parliament; the prerogatives of the Crown; the maritime law, naval and military law, and Royal proclamations; the course of proceedings and rules of practice in the Supreme Court of Judicature; the accession of the King; the existence and title of every State and Sovereign recognized by the King; the Great Seal, the Privy Seal; the Seals of the Superior Court of Justice; the seal of any notary-public in the British Dominions, and various other seals; the extent of the territories

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under the dominion of the Crown, and the territorial and political divisions of the different parts of the United Kingdom ; the ordinary course of natural and artificial divisions of time, and the meaning of English words ; and all other matters which they are directed by any statute to notice.

Proof of public documents.

1. Public statutes need no proof—being supposed to exist in the memories of all. Still, for certainty of recollection, reference is made to the printed statute-book, which is produced as evidence in all courts subject to the laws of England. The public acts of government, and acts by the King in his political capacity, are commonly announced in the *Gazette*, published by the authority of the Crown ; and of such acts announced to the public in the *Gazette*, the *Gazette* is admitted in courts of justice to be good evidence. Royal proclamations, the Articles of War, and addresses to the Crown, may all be proved in this manner : and any copy of any such documents, or of private, local, and personal Acts of Parliament, if *purporting* to be printed by the King's printer, are admissible in evidence.[1]

Documentary Evidence Act.

Great facilities for the admission in evidence of public documents of all descriptions have been given by the Documentary Evidence Act,[2] which enacts, "That whenever *by any Act now in force or hereafter to be in force*, any certificate, official or public document, or document or proceeding of any corporation or joint-stock or other company, or any certified copy of any document, bye-law, entry in any register or other book, or of any other proceeding, shall be receivable in evidence of any particular in any court of justice, or before any legal tribunal, or either House of Parliament, or any committee of either House, or in any judicial proceeding, the same

[1] 8 & 9 Vict. c. 113, s. 3.
[2] Ibid. s. 1.

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shall respectively be admitted in evidence, provided they respectively *purport* to be sealed or impressed with a stamp, or sealed and signed, or signed alone, as required, or impressed with a stamp and signed, as directed by the respective Acts made or to be hereafter made, without any proof of the seal or stamp, where a seal or stamp is necessary, or of the signature, or of the official character of the person appearing to have signed the same, and without any further proof thereof in every case in which the original record would have been received in evidence."

Proof of private documents.

2. The execution of all private written instruments, which by law require attestation,[1] must be proved either by the attesting witness himself, or evidence of his handwriting if he be dead or cannot be found. In the latter case, proof of the handwriting of the attesting witness is evidence of the execution of the instrument by the party therein named, whose signature it purports to bear; and, for the purpose of proving the execution, it will not be necessary to prove the handwriting of the party. But with a view to establish identity, and to show that the person who executed the instrument is the party charged, proof of the party's handwriting may be important and most satisfactory evidence.[2] In other cases the handwriting of the person executing the instrument must be proved.

Comparison of a disputed writing with any writing proved to the satisfaction of the judge to be genuine, shall be permitted to be made by witnesses; and such writings, and the evidence of witnesses respecting the same, may be submitted to the court and jury as evidence

[1] It will not be necessary to prove by the attesting witness any instrument to the validity of which attestation is not requisite, and such instrument may be proved, as if there had been no attesting witness thereto. 28 Vict. c. 18, s. 7.

[2] 2 Phil. Ev. 214.

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of the genuineness or otherwise of the writing in dispute.[1] Any writings which are proved genuine to the satisfaction of the court, may be used for the purposes of comparison, although they may not be admissible in evidence for any other purpose in the trial; and the comparison may be made either by witnesses acquainted with the handwriting, or by witnesses skilled in deciphering handwriting, or by the court, without the intervention of any witnesses.

Secondary evidence.

When a party who desires to offer any document in evidence is unable to produce the original written instrument, proof of the contents may be established by secondary evidence: 1st, when the original writing is destroyed or lost; 2ndly, when its production is physically impossible, or at least highly inconvenient; 3rdly, when the document is in possession of the adverse party, who refuses, after notice, and in some cases without notice, to produce it; 4thly, when it is in the hands of a third party who is not compellable by law to produce it, and who, being called as a witness with a *subpœna duces tecum*,[2] relies upon his right to withhold it.

When writing destroyed or lost.

1st. If the instrument be *destroyed or lost*, the party seeking to give secondary evidence of its contents must give some evidence that the original once existed, and must then either prove its destruction positively, or at least presumptively, by showing that it has been thrown aside as useless, or he must establish its loss by proof that a search has been unsuccessfully made for it in the place or places where it was most likely to be found; for this purpose the party is generally expected to show that he has in good faith exhausted in a reasonable degree all the sources of information and means of discovery which the nature of the case would naturally suggest, and which were accessible to him.

[1] 28 Vict. c. 18, s. 8. See p. 330.

[2] This is a judicial writ directed to the witness, summoning him to appear at the court, and to produce any books or papers in his possession.

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When production of writing impossible.

2ndly. The contents of writings may be proved by secondary evidence, when their production is either *physically impossible* or *highly inconvenient*. Thus, inscriptions on walls and fixed tables, mural monuments, gravestones, surveyors' marks, or boundary trees, notices affixed on boards, and the like, may be proved by secondary evidence, since they cannot conveniently, if at all, be produced in court. If a document be deposited in a foreign country, and the laws or established usage of that country will not permit its removal, secondary evidence of its contents will be admitted, because here, as in the case of mural inscriptions, it is not in the power of the party to produce the original.

When writing in possession of adversary.

3rdly. When the document is *in possession of the adversary, who withholds it at the trial*, secondary evidence of its contents will be admitted, provided that a *notice to produce the original* has been duly served where such notice is requisite. In order to render the notice available, it must be first shown that the instrument is in the hands, or under the control, of the party required to produce it. Of this fact very slight evidence will raise a sufficient presumption, where the document exclusively belongs to him, or regularly ought to be in his custody according to the course of business. If the instrument be in the possession of a person *in privity* with the party, such person need not be served with a *subpœna duces tecum*, or even be called as a witness, but a notice given to the party himself will suffice.

A notice to produce is unnecessary where, from the nature of the charge, *the defendant must know* that he will be charged with the possession of an instrument, and be called upon to produce it at the trial.[1] A notice

[1] This exception, however, has been held inapplicable to a charge of forgery, where the forged instrument being in the possession of the prisoner, it was necessary for the prosecutor to serve him or his attorney with a notice to produce it, before he could offer secondary evidence of its

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need not be given to the adverse party to produce a paper of which he has fraudulently or forcibly obtained possession. So also a notice will not be required where proof is given that the adverse party or his attorney has the original instrument in court, or has admitted the loss of the document.

When writing in possession of stranger.

4thly. Secondary evidence is admissible where a document is in the hands of a stranger, who is *not compellable by law* to produce it, and who *refuses* to do so when summoned as a witness with a *subpœna duces tecum*, or when sworn as a witness without a *subpœna*, if he admits that he has the document in court. In applying this rule, it must be carefully borne in mind that the mere disobedience of a person served with a *subpœna duces tecum*, will not render admissible secondary evidence of the contents of the document which he is called upon to produce; but the witness must also be *justified* in refusing the production, for otherwise the party will have no remedy except as against *him*.[1]

The reason why the rule is recognized at all is the same as that which admits parol proof, when the adversary, after notice, refuses to produce a deed in his possession, namely, that the party offering secondary evidence has done all in his power to obtain the original document.

contents: *R.* v. *Haworth* (1830), 4 C. & P. 254. And on a charge of perjury, where the prisoner, a solicitor, was indicted for having sworn that there was no draft of a certain statutory declaration made by his client, and where no notice to produce the draft had been given to the prisoner, and upon his trial it was proved to have been last seen in his possession, in the absence of such notice, secondary evidence was held inadmissible: *R.* v. *Elworthy* (1867), 1 C. C. R. 103.

[1] N.D. Act, s. 66.

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CHAPTER XVI.

THE CIVIL RIGHTS AND LIABILITIES OF SAILORS.

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In considering the position of sailors in their relation to the law of the land, the main principle underlying the subject is that the law of the whole land is supreme over the laws which are special to any of its parts. There

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are many special enactments providing for the circumstances attending the profession of the sea, but they do not disturb the principle under which one is a citizen first and sailor afterwards; a citizen by birth, a sailor only by profession. On the one hand, the sailor does not forfeit any of the privileges of citizenship, such, for example, as the protection and assistance which his country's laws afford him against wrong at the hands of his fellow-citizens. On the other hand, he does not enjoy immunity from the penalties due to offences against the common laws, or from the duties which devolve on every citizen with regard to his fellows.

Sailors retain the privileges of citizenship.

Some of the special enactments alluded to are made in the interests of the State, others in that of the individual who becomes the servant of the State. It is the object of this chapter to collect and present the instances in which the civil status of the citizen is modified or specially regulated to meet the circumstances of the sailor, or in which legislation imposes on the sailor duties, rights, or liabilities, from which the citizen simple is free.

The Births and Deaths Registration Act, 1874 (37 & 38 *Vict. c.* 88), *s.* 37 directs that the person in command of a British ship at sea shall, as soon as may be after the birth of a child or the death of a person on board the ship, record in his log-book the fact and certain particulars required by the fourth schedule to the Act.

Subsequently, according to the orders of the Board of Trade or the Admiralty, the particulars contained in the schedule are to be sent to the registrar-general of shipping and seamen, collector of customs, or consular officer. From his Majesty's ships these returns are to be sent to the Registrar-General in London, Edinburgh, or Dublin, according to the nationality of the child or person; but if this cannot be satisfactorily ascertained, then to the Registrar-General in London.

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The penalty for failure to comply with this section is not to exceed £5.

The particulars referred to in the schedule are embodied in form S. 544, for use in his Majesty's ships; but it may be useful to cite them here, namely :—In regard to a birth: Date, name (if any); name, surname, rank, and profession or occupation of father; name, surname, and maiden name of mother; nationality and last abode of parents. In regard to a death: Date, name, and surname, sex, age, rank, profession or occupation, nationality and last abode, cause of death. [A. S., 1905, vol. I. p. 62; Adm. Inst. 1020 and 1853.]

Death and Burial.—In connection with the Births and Deaths Registration Act, other legal requirements have to be fulfilled. In the case of sudden death, without such previous indisposition as would enable the medical officer to give the certificate necessary for interment, an inquest is to be held when practicable. On receiving the medical officer's report it becomes the captain's duty to acquaint the proper coroner with all the circumstances of the case, and to take care that all the witnesses are in attendance at the time and place appointed by the coroner. The chaplain officiating at the funeral is then responsible that the registrar's or coroner's certificate or order for interment is produced, and he will make the proper entries in the cemetery register. In the case of interment at naval hospitals, the certificate is to be left with the hospital chaplain, who is responsible for the correct keeping of the register.

If death has occurred on shore, the proper coroner is he within whose jurisdiction death occurred: this may always be ascertained by inquiry of the police.

If death take place afloat, even in waters washing the jurisdiction of several coroners, the coroner's jurisdiction is created where the body is first brought to land. [Coroner's Act, 1877 (50 & 51 Vict. c. 71), s. 7.]

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In every case a body may not be removed from the jurisdiction of one coroner to that of another until the inquest shall have been held or the coroner's order for its removal obtained.

The Admiralty Instructions direct that deaths are to be reported to the Admiralty, and that the nearest relative of the deceased is to be informed.

The funeral honours to which officers and men who die while on active service are entitled are also laid down in the Admiralty Instructions: these consist of minute guns, salutes of cannon, or volleys of musketry, according to rank, and a funeral and firing party similarly regulated.

The Foreign Marriage Act, 1892 [55 & 66 *Vict. c.* 23], *s.* 12, permits the solemnization of marriage on board one of his Majesty's ships on a foreign station, and allows the Secretary of State to authorize the commanding officer, *by warrant*, to be a marriage officer under the Act. Sec. 21 authorizes the Sovereign to make regulations by Order in Council to adapt the Act to marriages on board his Majesty's ships. [A. S., 1905, vol. I., p. 65.]

Parliament.—No deputy or clerk in the office of the Lord High Admiral or the Commissioners of the Admiralty, shall be capable of being elected, or of sitting or voting as a member of the House of Commons. This does not extend to the Comptroller of the Navy, or to the Secretaries of the Admiralty. [15 Geo. II., 1742, c. 22.]

No greater number than five Commissioners of the Admiralty shall be competent at any one time to sit and vote in the House of Commons. [2 & 3 Will. IV., 1832, c. 40, s. 1; A. S. p. 74.]

But beyond the two foregoing limitations there is no law to prevent sailors from becoming members of parliament.

Service on Juries.—Officers are exempt, in England under the Juries Act, 1870 (33 & 34 Vict. c. 77), s. 9 and schedule; in Scotland under the Jurors Act, 1825

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(6 Geo. IV., c. 22), s. 2; in Ireland under the Juries Procedure (Ireland) Act, 1876 (39 & 40 Vict., 1876, c. 78), s. 20 and schedule. In England and Scotland being on full pay is a condition of exemption. In Ireland exemption is granted to persons holding any public office under Government. This may be held to include naval officers, who are not particularly specified as in the Acts relating to England and Scotland; and, as no reference to full pay is made, it might be ruled that an officer on half-pay was not holding any office under Government, and exemption might be withheld. [A. S., 1905, vol. II., pp. 313, 312, 314.]

Men enjoy no exemption by law, but it is usual if their services are required for naval duty to represent the fact to the summoning authority and to ask that they be excused from sitting.

Municipal Office.—The Municipal Corporations Act, 1882 (45 & 46 Vict. c. 50), s. 253, exempts officers on full or half-pay from being compelled to accept any office or duty in any borough. The exemption extends, under the Act, to officers and other persons employed and residing in any of his Majesty's dockyards, victualling establishments, arsenals, barracks, or other naval or military establishments. The office of *Overseer* has been included in this exemption. [A. S., 1905, vol. II., p. 315, and O. M. p. 5.]

County Councils.—There is no rule in regard to the election of sailors to serve on county councils, and it is laid down in the Army Act, s. 146, that the provision as to municipal offices does not apply in the case of county councils. This ruling may serve as a guide for the navy; but it must be observed that, in the absence of any direct exemption from naval duty, the rule that duty must be considered first would reasonably entitle a commanding officer to decline to permit an officer on full pay to omit naval duty for the purpose of attending to the affairs of a voluntary civil office.

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Voting.—On the occasions of parliamentary elections every practicable facility consistent with the efficient conduct of the naval service is granted to *electors* to enable them to record their votes; the orders usually emanating from the Admiralty and the details of the facilities being arranged by the local naval authority. In the case of municipal and other similar elections, corresponding facilities are granted locally on the representation of the mayor or other civil officer concerned in the election. An Act of Parliament (10 & 11 Vict. c. 21) enacts that on nomination and polling days for parliamentary elections in Great Britain (not Ireland), no soldier within two miles of any place of nomination or polling shall be allowed to leave his barracks or quarters except on duty or to vote. There is no corresponding naval prohibition, but the above Act is referred to as affording some guide to officers in dealing with questions relating to *non-electors* at election times.

Company Directorates.—There is no naval prohibition of officers acting as directors of public companies; probably because none is necessary. Officers on full pay would in general not be able to serve, and those on half-pay would probably not be able to do so without prejudice to their availability for service, whereas retired officers do so serve.

King's Taxes due in respect of official residences, with the exception of the Land Tax, are to be paid by the occupier. [Adm. Inst. 417.]

Local Rates.—Inasmuch as the Crown obtains exemption from local rates by the payment of commuted sums, official residences are exempt from local rates.

Licence Duty for Servants.—Exemption is allowed in the case of man-servants employed in accordance with, and up to the numbers allowed by, the regulations of the service, and provision for this exemption will

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be found in the form of licence papers served on householders, &c. [32 & 33 Vict. c. 14.]

Tolls.—The question of tolls is one which is becoming of less interest daily as the toll gates are bought out and freed by local municipalities. The various local Acts, as a rule, contain exemptions for soldiers on duty, and the Army Act does so too. Sailors have not always the same legal exemptions, and where the local Acts allow them to pass free on duty, it is usual to compel them to produce a pass; while off duty, which is held to include going between their homes and their ships, they are compelled to pay the toll.

The Naval Savings Bank Act, 1866, provides for the establishment and regulation of Savings Banks for the Seamen of the Royal Navy and Royal Marines, and detailed instructions for the working are contained in the Admiralty Instructions. [29 & 30 Vict. c. 43; A. S., 1905, vol. II., p. 340.]

The Navy and Marines Wills Act, 1865, provides for the proper execution of the wills of petty officers, seamen, non-commissioned officers and marines, prisoners of war, and other persons of any capacity in the naval or marine forces, exclusive of commissioned, warrant, and subordinate officers, and of kroomen. A form (S. 545) is established and supplied to ships, on which form are printed precise instructions as to the manner in which wills should be drawn up. Sect. 7 dispenses with the formalities required by the Act when the Admiralty are of opinion that in special circumstances of death such requirements may properly be dispensed with. [28 & 29 Vict. c. 72; A. S., 1905, vol. I., p. 57.]

Realization of Effects and Adjustment of Estate.—The Navy and Marines (Property of Deceased) Act, 1865, provides for the disposal of money and effects *under the control of the Admiralty*, belonging to deceased officers, seamen,

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and marines. [28 & 29 Vict. c. 111; A. S., 1905, vol. I., p. 59.] Detailed instructions founded on the Act are given in the Admiralty Instructions, Article 1618, and in a volume of Instructions for Naval Savings Banks.

Arrest for Debt.—Petty officers and seamen, non-commissioned officers and privates of marines belonging to any of his Majesty's ships are exempt from arrest, under any warrant, process, or writ issued in British dominions, for any debt contracted while the debtor belonged to the service. [N. D. Act, ss. 97, 98, and Adm. Inst. 800, cl. 1.]

Maintenance of Family.—But moneys payable under orders in pursuance of the Matrimonial Causes Act [41 Vict. c. 19], or of the Married Women's Maintenance in case of Desertion Act [49 & 50 Vict. c. 52], are not debts within the meaning of the sections of the Naval Discipline Act quoted in the preceding paragraph, and seamen or marines against whom such orders have been obtained are therefore liable to arrest by the civil power for non-compliance with the same. [Adm. Inst. 799, cl. 2.]

Arrest by Civil Power while in Naval Arrest.—No officer or man in lawful arrest on board can be brought before a civil court by warrant or summons from a justice of the peace; the only order to which he must be surrendered is a writ of *habeas corpus*. [Adm. Inst. 800, cl. 3.]

Necessary Equipment.—Articles of uniform or clothing which may be reasonably necessary to enable an officer or man to whom they belong to perform the duties then or at any time likely to be required of him are exempt from seizure on board ship within British dominions by civil process. [Adm. Inst. 800, cl. 5.]

Protection of Seamen's Clothes and Property.—The Seamen's Clothing Act, 1869, restrains the sale of the clothes, slops, medals, or articles usually deemed to be

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necessaries for sailors, and provides penalties on those who detain, purchase, exchange, take or pawn, receive, or are found in possession of such property, in any of the dockyard towns of Portsmouth, Plymouth and Devonport, Chatham, Sheerness, Cork or Queenstown. The same statute makes it punishable to solicit any seaman to sell, exchange, or pawn seamen's property. This Act provides a check on the seaman as well as on pawnbrokers and marine-store dealers; preventing the former from making away with his necessaries in order to provide himself with money, and the latter from robbing the seaman. [32 & 33 Vict. c. 57.]

Improperly Wearing Naval Uniforms.—The Uniforms Act, 1894, s. 2, makes it unlawful for any person not serving in the forces to wear without the Sovereign's permission any of the uniforms of those forces, or any dress having the appearance or bearing any of the distinctive marks of such uniforms.

An exception is made in regard to dresses worn in the course of a stage play in a duly licensed place, or in the course of a music-hall or circus performance, or in the course of any *bonâ fide* military representation.

The penalty for contravention of the foregoing section is a fine not exceeding £5.

Sect. 3 of the Act forbids the wearing of similar uniforms by persons not in the royal forces, in such a manner as to bring contempt upon the uniform. The person wearing or employing another person to wear the dress shall be liable to a fine not exceeding £10, or imprisonment not exceeding one month.

Seduction of Sailors from Duty.—The offence of endeavouring to seduce any person serving in the forces from their duty and allegiance, or of inciting such persons to mutiny, is felony, punishable with penal servitude for life, or imprisonment for two years. The authority for this is 37 George III., c. 70 [A. S., 1905, vol. I.,

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p. 37]: it refers to civilians in general; the Naval Discipline Act, s. 12, deals with persons subject to that Act, and sec. 13 refers to persons not otherwise subject to the N. D. Act, but who are on board any royal ship. In most cases the last-named Act would be relied on; but the older statute might be called into use to meet any case not coming under the N. D. Act.

Conveyance of Treasure.—In time of war the conveyance of treasure by ships of war may become a matter of considerable interest to those concerned in the profits to be derived from it, and as the subject is one of a semi-private or commercial nature, a few words on it may be in place in this chapter. An Act, dated 8th April, 1819, gave to the Sovereign power to distribute to such persons, and in such proportions as he, his heirs and successors should deem fit, the freight money payable for the conveyance of treasure in the royal ships. Various proclamations under the Act have from time to time been issued on this subject; but the proclamation now in force is that dated 10th August, 1888, which came into force on the 1st of October of that year. It will be found printed in full in the Quarterly Navy List, but its general features are these: The freight money is divided into four equal parts and distributed: One-fourth to the flag-officers on the station to which the conveying ship belongs; two-fourths to the officer commanding the said ship; one-fourth to Greenwich Hospital. The Royal Proclamation provides for the sub-division of the flag-officer's fourth among two or more flag-officers, and for the payment of the flag share, where not any flag-officer is entitled to share, to the officer commanding. But it is essential to the flag officers receiving a share that they shall have entered into, and published in general orders, an engagement to share any losses or damage incurred in the conveyance, in the same proportion as they would share the freight money.

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History of freight money.

The custom to carry bullion and jewels, on private as well as on public account, has been long established in the navy; it probably originated early in the seventeenth century, at a time when the sea was infested with pirates, as well as exposed to the constantly recurring peril of war. Merchants were glad of insuring greater safety, and captains equally desirous of acquiring profit by a carrying trade in valuables, on board the King's ships. In the reign of Charles II., dissolute courtiers, who had never been at sea, clamoured for naval commands.

"The chief bait," says Macaulay, "which allured these men into the service, was the profit of conveying bullion and other valuable commodities from port to port; for both the Atlantic and Mediterranean were then so much infested by pirates from Barbary that merchants were not willing to trust precious cargoes to any custody but that of a ship of war. A captain in this way sometimes cleared several thousand pounds by a short voyage; and for this lucrative business he too often neglected the interests of his country and the honour of his flag." [Hist. Eng., vol. i., p. 312.]

For the conveyance of treasure on public account the captains claimed a percentage, under pretence of a right founded on ancient usage, and by the same usage one-third of all such money so allowed to the captain for freight was paid over to the commander-in-chief[1] under whose orders such captain sailed, to be divided between himself and the junior flag-officers; but if there was no other flag-officer, the commander-in-chief kept the whole. In 1801 this allowance for freight was discontinued; but in 1807 a gratuity, at the rate of one-half per cent. was, by order of the Admiralty, made payable to the captains and commanders of his Majesty's ships for the freight

[1] *Montagu* v. *Janverin* (1811), 3 Taunt. 444, and Correspondence of Admiralty, 477.

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of all public moneys. Soon afterwards disputes arose between admirals and captains respecting the flag share, which gave rise to much litigation in the superior courts; the result being that it was decided unanimously by the Courts of Common Pleas and King's Bench, that there was no legal custom entitling flag-officers to any share, either in the gratuity given to captains for carrying public treasure, or in the freights received by them for the conveyance of private treasure.[1]

It was also determined about the same period by the Court of Common Pleas that no captain (unless permitted by the regulations of the Admiralty) had any right to carry private treasure, inasmuch as he could not lawfully employ the ship and crew, which ought to be employed in the service of his Majesty, in carrying bullion for individuals; for it could not be legal to divert a King's ship from its destination for his own private emolument.[2]

This question was at length set at rest in 1819, by Act of Parliament (59 Geo. III., c. 25), which authorized the Crown by proclamation to fix the rate and direct the distribution of freight money for the conveyance both of public and private treasure on board his Majesty's ships. But the Lords of the Admiralty have no power to adjudicate upon conflicting claims arising from the conveyance of treasure; no such power is vested in them by the proclamation of 1819; the question in dispute can only be legally determined in a court of law, unless the parties agree to abide by the opinion of the Board of Admiralty.

Captains responsible for loss of private treasure.

Where the commander of a ship in his Majesty's service contracts to carry treasure on private account,

[1] *Montagu* v. *Janverin* (1811), 3 Taunt. 455; *Warren* v. *Shirreff* (1816), 5 M. & S. 32.

[2] *Brisbane* v. *Dacres* (1813), 5 Taunt. 151; *Hatchwell* v. *Cooke* (1816), 6 Taunt. 580. See 2 Prendergast, 361, where all the cases are collected and commented upon.

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and to keep it safely and deliver it, he is *answerable for the loss*, as was decided in *Hodgson* v. *Fullarton*,[1] where part of the bullion shipped was plundered by the crew; and in *Hatchwell* v. *Cooke*,[2] where the silver shipped was stolen out of the master's cabin after the ship had arrived and lain a considerable time at Woolwich.

Prize money and salvage.

Prize Money and Salvage.—Another source of emolument, and one which interests a wider circle of persons in the Royal Navy, is prize money. It was formerly the custom to enact at the commencement of a war certain provisions respecting naval prizes and matters connected therewith. By the Naval Prize Act, 1864 [(27 & 28 Vict. c. 25)], these former provisions were amended and enacted permanently, and the Act gave power to the Sovereign to make from time to time such Orders in Council as might seem meet for the better execution of the general provisions of the Act. The Order in Council which now legislates for the distribution of prize money is that dated 17th September, 1900. It is printed in the Navy List, and contains instructions as to what ships shall share, and the proportion to which each class of person in those ships is entitled. It provides also that these proportions shall govern the distribution of all rewards, allowances, salvage awards, bounties, and grants whatsoever, distributable to the Royal Navy.

Conveyance of Officers, Seamen, and Marines by Railway.—Various enactments have from time to time been made respecting the obligations of railway companies in the matter of conveying the royal forces by train, but with a few now unimportant exceptions the whole matter was consolidated in the Cheap Trains Act of 1883. [46 & 47 Vict. c. 34; A. S., 1905, vol. II., p. 402.] "Forces" include navy, army (regulars and auxiliaries), and police. On the production of a route order duly signed, the com-

[1] (1813), 4 Taunt. 786.
[2] (1816), 6 Taunt. 576.

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panies provide conveyance for persons, personal luggage, baggage, stores, arms, ammunition,* and necessaries by the usual trains on the terms laid down in sec. 6, as follows :—

i. Carriages to be of such classes as are in use on the railway, protected from the weather, and having proper accommodation.

ii. Fares. Less than, and up to 150, three-fourths ordinary charge ; over 150, one-half.

iii. Sub-sec. ii. applies to wives, widows, and children, entitled to conveyance at public expense ; children under 3, free ; between 3 and 12, half of fare under ii.

iv. One cwt. of personal luggage free for each first class, half-cwt. for each other passenger. Excess luggage at two-thirds of public rate.

v. Public baggage, stores, arms, ammunition,* necessaries, and things, at 2*d.* per ton per mile, assistance being given by the forces in loading and unloading.

vi. *Combustibles carried on special terms only.

Beyond the statutory obligations as to the conveyance of persons on duty, the railway companies make very generous concessions to officers and men travelling on their private affairs ; these are ascertainable locally and only require mention here.

Effect of Treason and Felony.—Conviction followed by sentence of death, penal servitude, or any term of imprisonment with hard labour or exceeding 12 months, shall render the person so sentenced incapable of holding office under the Crown until he shall have suffered his punishment or receive a free pardon. Practically this debars the person from further service, as conviction of treason or felony entails dismissal, and the sentence may even include incapacity ever to serve again under the Crown. [33 & 34 Vict., 1870, c. 23, A. S., 1886, p. 481.]

Pensions are dealt with in the Naval Pensions Act,

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1884, [47 & 48 Vict., 1884, c. 44; A. S., 1905, vol. II., p. 285] and the Pensions Commutation Act [34 & 35 Vict., 1871, c. 36; A. S., 1905, vol. II., p. 281], and the Admiralty Instructions, Chapters LI. to LIV., Addenda, Part II., contain detailed rules made under those Acts.

Assignment of Pay or Pension.—Under the Naval and Marine Pay and Pensions Act [28 & 29 Vict., 1865, c. 73; A. S., 1905, vol. II., p. 275], any assignment, sale, or contract by an officer, seaman, or marine, the widow of either, or other person entitled to compassionate allowance or half-pay on his account, of pay, wages, bounty-money, grants, or other allowances in respect of naval or marine service is void. Under the Greenwich Hospital Act [28 & 29 Vict., 1865, c. 89; A. S., 1905, vol. II., p. 288] this applies equally to Greenwich Hospital pensions, gratuities, and allowances. In effect, moneys due for naval or marine service may not be pledged or given to creditors or pawnbrokers for debts or loans.

Civil Officials.—It is the duty of commanding officers, when satisfied of the official character of a constable or officer of a civil court, to afford him every facility to detect and apprehend persons serving on board who may be accused of any crime, and to aid such official to the utmost of his power in the execution of his duty. This general provision is subject to the exceptions which have been quoted in the early part of the chapter in regard to persons pursued for debt contracted while in the navy, and to persons legally under naval arrest.

Personal Liability of Officers in Service Matters.—Naval officers ordering works to be performed or goods to be supplied for the public service, within the limits of their official authority, do not incur by the law any personal responsibility for payment. In such cases the Government is the debtor to whom the creditor must look for satisfaction. "In any case where a man acts as agent for the public, and treats in that

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capacity, there is no pretence to say that he is personally liable." [1]

It is quite immaterial whether the officer gives the orders in person or through a subordinate agent appointed by himself. [2]

An agent of the Government may, however, by transgressing the limits of his authority, for instance, render himself personally liable upon orders given by himself in the execution of his office. The question as to his action having rendered him liable is one for the determination of the jury.[3]

But where an officer is acting in his private capacity and for his own private purposes, the ordinary rules of law apply in the same manner as between civilians; and this though he may be a minor and the articles may be needful to him in his professional position.[4] On the other hand, if goods not needful to his position be obtained, the defendant may successfully plead his infancy, and the determination of the necessity for the goods will rest with the jury. Thus it was held that a lieutenant in the Royal Navy, under the age of 21 years, in an action to which he had pleaded his infancy, was not answerable for the price of a chronometer.[5]

Domicile.—By law every man's domicile is in the country where he has his permanent residence, or to which he returns for the purpose of residence after occasional absence. In the case of his death the right of succession to his goods, chattels, and personal property of all kinds is regulated by the law of the country of his domicile, although he may happen to die beyond it. Service in the navy, or employment abroad on such service, does

[1] *Macbeath* v. *Haldimand* (1786), 1 T. R. 182.
[2] *Rice* v. *Chute* (1801), 1 East, 579.
[3] *Macbeath* v. *Haldimand* (1786), 1 T. R. 177.
[4] *Hands* v. *Slaney* (1810), 8 T. R. 578; *Coats* v. *Wilson* (1804), 5 Esp. 152.
[5] *Berolles* v. *Ramsay* (1815), Holt's N. P. 77.

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not cause a change of domicile.[1] But in the case of officers who enter the service of a foreign State, they may, but do not necessarily, abandon or lose their native domicile. The question will depend on the circumstances of the case; these circumstances may be very numerous, and as they would not form a subject for decision by any naval authority or tribunal, it is not considered desirable to attempt to give examples in this work.

Collective Rights.—A suit may be maintained by a ship's company, or by some of them on behalf of themselves and all others concerned, against prize agents, for an account of the proceeds of captures, and for a distribution of the money according to proclamation.[2]

[1] *Somerville* v. *Somerville* (1801), 5 Ves. 750.
[2] *Leigh* v. *Thomas* (1751), 2 Ves. Sen. 312, and *Good* v. *Blewitt* (1807), 13 Ves. Jun. 397.

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APPENDIX I.

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I.—INSTRUCTIONS FOR FRAMING THE CHARGES.

Persons who may be tried.

(1) Three classes of persons may be tried by Court-Martial under the provisions of the Naval Discipline Act:—

N. D. A. s. 87.

a. Persons in or belonging to His Majesty's Navy whose names were, at the time when the offence was committed, borne on the books of one of His Majesty's Ships in commission, including such passengers as are mentioned in the last paragraph of Article 726, K.R. and A.I.

N. D. A. s. 90.

b. Persons borne on the books of hired vessels in His Majesty's Service *in time of war* where the Admiralty has thought fit to direct that such persons should be subject to the Naval Discipline Act, and where such direction has been specified in the ship's articles.

N. D. A. s. 6 and s. 13.

c. In two cases only (those of spies and of persons on board any of H.M. Ships endeavouring to seduce persons subject to the Naval Discipline Act from their allegiance), where the nature of the offence renders the person committing it liable to be tried by Court-Martial. The form of charges against such persons will be found at page 447.

(2) Besides these classes of persons, Officers and men of the Colonial Naval Forces, the Indian Marine Forces, and of the Royal Naval Reserve and Royal Fleet Reserve, Royal Naval and Marine Volunteers, Naval and Marine Pensioners and Seamen Riggers may be tried by Naval Court-Martial in the circumstances mentioned in the Acts governing those forces as detailed in Chap. IX.

Preparation of charges.

(3) In preparing charges, it is desirable on the one hand that they should not be unduly multiplied. It is in general sufficient to frame charges based on the salient facts, omitting minor charges which might perhaps have been added.

Alternative charges.

(4) On the other hand, where there is a doubt whether a more serious charge will be completely established, it is sometimes desirable to include a further charge of another and less

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serious class upon which, if the facts warrant it, the accused may be convicted, as Section 48 of the Naval Discipline Act only authorises the court to find a prisoner guilty of another less serious offence *of the same class* as that charged.

(5) For instance, if the facts suggest that a charge of mutiny, or joining in, or inciting others to join in a mutinous assembly, may be properly framed, it may be desirable to add a charge framed under Section 43 as for an act to the prejudice of good order and Naval Discipline, in behaving in a disorderly manner. Or, to take another instance, with a charge of theft it may be desirable to join a further charge of receiving the property knowing it to have been stolen. But when this course is followed, care must be taken not to convict the accused of two or more inconsistent charges.

Framing charges.

(6) Charges are to be drawn according to the following forms :—

A.—COMMENCEMENT.

In charges under Section 2 of the Naval Discipline Act :—

Flag Officers and Commanding Officers.

"For that he then having command of His Majesty's Fleet in [having command of H.M.S.] then being a person subject to the Naval Discipline Act on the day of 19 , did {traitorously / from cowardice / from negligence or through other default}"

In all other cases where the offender's name is borne on the books of one of His Majesty's Ships :—

Ordinary Cases.

"For {he / that they} {No. Able Seaman. Official No. . Private , Royal Marine Light Infantry} belonging to His Majesty's Ship , then being {a person / persons} subject to the Naval Discipline Act, {did / was / were} [on the day of , 19 ,] [between the day of , 19 , and the day of , 19 .]"

Crews of Hired Vessels.

In cases where the offender's name is borne on the books of a hired ship :—

"For {he / that they} being person[s] whose name[s] {was / were} then borne on the books of the S.S. , a hired vessel in the service of His Majesty in time of war and being {a person / persons} then subject to the Naval Discipline Act, {did / was / were} [on the day of 19 ,] [between the day of 19 , and the day of , 19]"

NOTE.—*As regards the date, the charge should be proved as laid, but if through inadvertence the wrong date be inserted, the error is not fatal to the charge, which may be amended in the manner pointed out in Article* 690.

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B.—Body of Charge.

Misconduct in the Presence of the Enemy.

N. D. Act.

S. 2.
- not upon signal of battle [on sight of a ship which it was his duty to engage] use his utmost exertion to bring the said Fleet [Ship] into action.
- not during the action between His Majesty's Fleet and the Fleet of in his own person and according to his rank encourage his inferior officers and men to fight courageously.
- surrender H.M.S. to the enemy when capable of making a successful defence.
- in time of action between the said Fleet [Ship] and the Fleet of [*or*] improperly withdraw from the fight.

S. 3.[1]
- traitorously [from cowardice *or* from negligence or through other default] forbear to pursue the chase of then beaten or flying.
- traitorously [from cowardice *or* from negligence or through other default] not relieve and assist H.M.S. (the S.S. *or, as the case may be*), a known friend then in view, to the utmost of his power.
- traitorously [from cowardice *or* from negligence or through other default] improperly forsake his station.

S. 4.
- being commanded to . . . presume to delay or discourage the performance of the said duty.
- in the presence or vicinity of the enemy desert his post [sleep upon his watch].

S. 5.[2]
- being ordered to prepare for action [during the action between His Majesty's Fleet and the Fleet of *or* between H.M.S. and] traitorously [from cowardice *or* from negligence or through other default] not use his utmost exertions to carry the orders of , his superior officer, into execution.

Communications with the Enemy.

S. 6. *See* p. 447.

S. 7.
- traitorously hold correspondence with [give intelligence to] the enemy.
- fail to make known to information which he had received from the enemy.
- relieve the enemy with supplies.

S. 8.
- without any treacherous intention hold improper communication with the enemy.

Neglect of Duty.

S. 9.
- desert his post / sleep on his watch } [when on duty as sentry].
- negligently perform the duty imposed upon him when [acting as coxswain of the cutter].

[1] Applicable to Officers only. [2] Not applicable to Commanding Officers.

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Mutiny.

S. 10.
- join in a mutiny accompanied by violence on board the said ship [at the Royal Naval Barracks at].
- traitorously / from cowardice / from negligence } not use his utmost endeavours to suppress a mutiny accompanied by violence on board H.M.S. [at the Royal Naval Barracks at].

S. 11.
- join as [a] ringleader[s] in a mutiny not accompanied by violence on board H.M.S. [at the Royal Naval Barracks at].
- join in / not use his [their] utmost endeavours to suppress } a mutiny not accompanied by violence on board H.M.S. [at the Royal Naval Barracks at].

S. 12.
- endeavour to seduce then subject to the Naval Discipline Act from his duty or allegiance to His Majesty [did endeavour to incite then subject, &c., to commit an act of mutiny].

S. 13. *See* p. 447.

S. 14.
- make [endeavour to make] a mutinous assembly.
- lead [incite to join in] a mutinous assembly.
- utter words of sedition [mutiny].

S. 15.
- wilfully conceal a traitorous [mutinous] practice [design].
- wilfully conceal traitorous [mutinous] words spoken against His Majesty.
- wilfully conceal { words / a practice / a design } tending to the hindrance of the Service.

S. 16.
- strike / attempt to strike with a weapon / draw / lift up } a weapon against / use [attempt to use] violence against { of the said ship, his superior officer, being [not being] in the execution of his office.

NOTES.

(a) *A superior officer is always to be considered in execution of his office when afloat in H.M. ships and vessels, and when on duty on shore at Naval Barracks or elsewhere, and also in any other circumstances in which he may be called upon to exercise his office. In all other circumstances resulting in the trial of an offender for striking, &c., his superior officer, the latter should be described as not being in the execution of his office.*

(b) *Striking a superior officer in the execution of his office, being a capital offence, can only be dealt with by court-martial. (See section* 56 (1) *and* (2) *N. D. Act.)*

(c) *No person subordinate to a petty officer, but temporarily acting in the room of a petty officer, nor any such person in*

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temporary charge of a working party, boat's crew, or other body of men, can be considered the superior officer of the men temporarily in his charge, within the meaning of the Act, although for the purposes of discipline he has authority over them for the time being. The offence, therefore, of striking, &c. any such person should, when dealt with by court-martial, be made a charge under section 43.

This does not refer to bonâ fide acting petty and non-commissioned officers, nor to lance sergeants and lance corporals. (See Article 1138, *clause* 2, *of the King's Regulations and Admiralty Instructions.)*

(*d*) *In charges of striking, or attempting to strike, or of using violence, or attempting to use violence, towards a superior officer, it is not necessary to insert the details descriptive of the mode of such striking, nor, of the manner in which such violence was used, nor, if the accused has used a weapon, need the nature of the weapon be stated in the charge. These particulars will be found in the Circumstantial Letter.*

Insubordination.

S. 17. { wilfully disobey the lawful command of of the said ship, his superior officer [when ordered to, &c.], use threatening [insulting] language { to of the said ship, his superior officer. behave with contempt }

NOTES.

(*e*) *To constitute an offence of "behaving with contempt" it is not necessary for the subordinate to be insolent in manner or disrespectful in tone, so long as, being in the presence of his superior officer, the act done or the words used show contempt for the position or the orders of such superior officer.*

(*f*) *As regards "superior officer," see note* (*c*) *to section* 16.

S. 18. { quarrel [fight] with use to reproachful [provoking] speeches [gestures], tending to make a quarrel [disturbance].

NOTE.

(*g*) *The words used need not be stated, nor the gestures described in charges under sections* 17 *and* 18. *These particulars will be found in the Circumstantial Letter.*

Desertion and absence without leave.

S. 19. desert from the said ship [to the enemy].

NOTE.

(*h*) *A charge of "attempting to desert" must not be drawn. The definition of the offence of desertion is given in section* 19, *N. D. Act, as doing any act which shows that there is no intention*

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of returning. To justify a conviction, therefore, it is not necessary that the deserter shall have succeeded in fully effecting an escape.

S. 20. endeavour to seduce to desert.
S. 21. then being the officer in command of H.M.S. , and having received on board the said ship , a deserter from His Majesty's Naval [Military] forces, not on discovering the said to be a deserter give notice to, &c. [*mentioning one or other of the persons specified in the Act*].
S. 22. improperly leave his ship [place of duty].
S. 23. absent without leave between and .

NOTE.

(*j*) *The period of absence should always be stated in a charge of "absence without leave." The dates and times when the prisoner absented himself and returned should therefore be shown in the charge.*

Miscellaneous Offences.

S. 27.
- drunk { on board the said ship [in the Royal Naval Barracks at]. / [on duty] on shore at . }
- guilty of profane oaths / cursing / execration { on board the said ship [in Royal Naval Barracks at] [on duty on shore]. }
- guilty of uncleanness.
- guilty of a scandalous action in derogation of God's Honour and corruption of good manners.

NOTES.

(*k*) *Charges of drinking intoxicating liquors to such excess as to produce illness are to be framed under section* 43.

(*l*) *The words used need not be stated in a charge of profane oaths, cursing, &c. (see note (g) above).*

(*m*) *Charges of indecent assault and of acts of gross indecency with a male person come under section* 45.

S. 28.
- guilty of cruelty in ordering excessive and unauthorised punishments to be inflicted on , of the said ship.
- guilty of scandalous conduct in writing anonymous letters tending to injure the character of Lieutenant , of the said ship.
- guilty of fraudulent conduct in, &c. [describing the fraudulent conduct].
- guilty of conduct unbecoming the character of an officer [in assuming the name of another officer of the said ship when arrested by the civil power for a disturbance on shore, and afterwards denying that he had done so].

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NOTE.

(n) Before ordering charges to be framed under section 28, *Article* 695a (v) *A. I. must be carefully studied, for it must be remembered that the provisions of section* 28 *of the N. D. A. with respect to the sentence to be awarded are peremptory. If, therefore, a court-martial finds an accused person guilty of a charge framed under this section, there is no choice but to award the punishment prescribed, any other sentence being illegal. Attention is called to the instructions contained in paragraph* (4) *on page* 435 *as to the desirability of preparing alternative charges in cases such as this.*

S. 29. { designedly / negligently / by default } { lose / strand / hazard } the said ship.
suffer the said ship to be lost [stranded *or* hazarded].

S. 30.
- being an officer of H.M.S. , appointed for the convoy of [certain ships or vessels], not defend the said ships and goods under his convoy without deviation to any other objects.
- being an officer of H.M.S. , appointed, &c. refuse to fight in defence of the said ships when they were assailed.
- being an officer of H.M.S. , appointed, &c. cowardly abandon and expose the said ships to hazard.
- being an officer of H.M.S. , appointed, &c., demand and exact the sum of £ [*state the nature of the other reward*] from [merchant (*or* master of the)] for convoying the (*mention the vessels' names*) entrusted to his care.
- being an officer of H.M.S. , appointed, &c., misuse the master (or mariners) of the (*mention name of vessel*).

S. 32. being the officer in command of H.M.S. , unlawfully receive on board the said ship certain goods and merchandise.

S. 33. { wastefully expend / embezzle (*v.* p. 442) / fraudulently { buy / sell / receive } / knowingly permit the { wasteful expenditure of / embezzlement of / fraudulent sale of / fraudulent receipt of } } { ammunition / provisions / certain stores } the property of His Majesty.

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NOTE AS TO EMBEZZLING STORES.

(*o*) *Where the offence is committed by a storekeeper, or other person whose duty it is to receive and take charge of stores, the charge should be preferred as one of embezzlement. In other cases the charge should be for stealing, under section* 45 *of the N. D. Act.*

S. 34. unlawfully set fire to . . . not being the property of an enemy, pirate, or rebel.

S. 35. knowingly make [sign] a / command / counsel / procure / aid in / abet in — the making [signing] of a — false official document, that is to say, a false [muster *or* record, *or as the case may be, describing the document alleged to be false*].

S. 36.
- with intent to produce or aggravate any disease or infirmity [to delay his cure], wilfully [drop a shot on his foot *or* tear off his bandages, *or as the case may be*].
- with intent to produce or aggravate any disease or infirmity [to delay his cure], wilfully disobey the orders of Surgeon .
- feign that he was suffering from .
- feign that he was unable to perform his duty.

S. 37. unlawfully attempt to stir up a disturbance in relation to a complaint with reference to [the unwholesomeness of the victuals, *or as the case may be*].

S. 38. then being the officer in command of H.M.S. , which had taken the as prize, unlawfully fail to send all the papers, charter parties, bills of lading, passports and other writings whatsoever to the Probate, Divorce and Admiralty Division of the High Court of Justice [*or as the case may be, describing the court to which the papers should have been sent*].

S. 39. unlawfully take out of the , before the same had been judged lawful prize, certain [money, plate, *or* goods, *as the case may be*].

S. 40. unlawfully strip of his clothes [pillage, beat *or* evil intreat] , of the , which had been taken as prize.

S. 41.
- being the Commanding Officer of H.M.S. , by collusion with the enemy take as prize.
- being the Commanding Officer of H.M.S. , unlawfully agree with to ransom , which had been taken as prize.
- being the Commanding Officer of H.M.S. , and having made an unlawful agreement with for the ransoming [restoration] of , unlawfully quit *or* restore the same.

S. 42. with intent to embezzle certain [goods, *or as the case may be*], break bulk on board the , then taken as prize [then lawfully detained].

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S. 43.
guilty of an act to the prejudice of good order and naval discipline.
in smuggling spirits into the said ship.
in striking , Leading seaman of the said ship.
in violently resisting an escort [when being brought off to the said ship].
in drinking intoxicating liquors to such excess as to produce illness, by which he was unfitted for the discharge of his duty on the day of 19 , [between the day of 19 , and the day of 19].
in wilfully making a false charge against of H.M.S. .

NOTE.

(p) *Charges are only to be drawn under section* 43 *when the offence does not come under any other section of the Act.*

S. 51. not use his utmost endeavours to detect, apprehend, and bring to punishment who had committed an offence against the Naval Discipline Act.

S. 45. *Offences punishable by ordinary Law.*

(1) *Offences of Violence.*

murder [attempt to murder] .
guilty of manslaughter by killing .

(2) *Offences of Immorality.*

commit sodomy with .
commit an indecent assault on .
commit an act of gross indecency with , another male person.
procure the commission of an act of gross indecency upon himself by , another male person.

NOTE.

(q) *The charge of sodomy should not be preferred unless the facts alleged clearly point to the commission of the full offence. Unless this is so, it is better to frame a charge, under the Criminal Law Amendment Act,* 1888, *for an act of gross indecency with a male person.*

If the more serious charge has been preferred, but at the trial the evidence fails to establish the commission of the full offence, it is competent for the Court to find the accused guilty of an act of gross indecency with a male person (if the act done was consented to by the person suffering it) or of an indecent assault. The Court, however, has no power to find an accused person guilty of an indecent assault, unless it is proved that the act was done against the will of the person suffering it.

The charge of procuring the commission of an act, &c. may be

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found useful in cases in which the facts alleged point to one of the persons implicated being led into the offence by reason of the superior position or age of the other.

(3) *Offences of Dishonesty.*

rob of a gold watch [*or, as the case may be*].

NOTE.

(*r*) *Robbery is the felonious and forcible taking of any property from the person of another, or in his presence, against his will by violence or by putting him in fear.*

steal the property of .

NOTES.

(*s*) "*Stealing*" *or* "*theft*" *is the felonious taking, without violence or putting in fear, of the property of another without his consent and with the intent to deprive the owner thereof and to convert it to the taker's own use. Under the provisions of section* 48, *a person charged with theft may be convicted of the attempt. A taking is said to be* "*felonious*" *when it is done with a dishonest intent, and without any colour of right to excuse it.*

With regard to "*theft by finding*" *the law is that no person can be found guilty of theft in such circumstances unless the felonious intent has been established, that is to say, unless at the time when he found the property* (1) *he appropriated it to his own use,* (2) *reasonably believing that the owner could be found.*

(*t*) *When an offender is charged with theft, and the evidence adduced fails to establish the technical ingredients of that offence as above defined, the Court should acquit him of theft, but may, under section* 48 *of the Naval Discipline Act, when the facts warrant it, convict him of an attempt to thieve, or of embezzlement, or of wrongful appropriation. But he must not be convicted of this last-mentioned offence unless he fraudulently converted to his own use the whole, or any part, or proceeds of property which may have—*

(1) *come into his possession as a trustee ;*

(2) *been entrusted to him for safe custody, or in order that he might apply, pay or deliver it, or some part of it, or any proceeds of it, for any person or to any person ;*

(3) *been received by him, either solely or jointly with any other person for or on account of any other person.*

If the Court should be of opinion that the facts do not justify them in finding a person charged with theft guilty of that offence, or of an attempt to thieve, or of embezzlement, or of wrongful appropriation as above explained, he must be acquitted entirely.

See also note (*v*) *and footnote* on p. 445.

embezzle received by him on account of His Majesty [of Lieutenant of the said ship by whom he was employed as a servant].

NOTE.

(*u*) "*Embezzlement*" *is the conversion to his own use of property which a person has received on account of an employer. The*

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difference between embezzlement and other kinds of theft is that, in other kinds of theft the property is taken out of the possession of the owner, whereas in embezzlement, the property has never been in the possession of the owner, but is converted by the offender, whilst it is in the offender's possession, on account of his master or employer, and before that possession has, by any act of the owner, been changed into a mere custody.

In the case of Government stores on board H.M. ships, the storekeeping officer is usually in legal possession of the stores on behalf of the Crown, and other persons (even if they are appointed to assist the storekeeping officer and draw store allowance for performing the duty), cannot as a rule be guilty of embezzlement of the stores, since they have not the legal possession of them. They may, however, be guilty of simple larceny or of larceny as a servant.

being a bailee of the sum of , steal the same [*or* thereof].

NOTE.

(*v*) "*A bailee*" *is a person who has been entrusted with money or goods which he has to return or deliver to another person. A person should not therefore be charged with larceny as a bailee in cases where it cannot be shown that he was bound to return or hand over to some third person the identical article, coins, or whatever it may be, which he has received. In cases where this cannot be shown, such as the ordinary cases of misappropriation of money belonging to a mess, the accused should be charged under the Larceny Act,* 1901, *in the next form, with fraudulently converting to his own use money with which he has been entrusted.*[1]

"*Fraudulent conversion*" *is the fraudulent appropriation to his own use by any person other than the owner thereof of any article, money, or the like.*

being entrusted with pounds shillings pence in order that he might retain the same in safe custody and apply [pay] the same [in discharge of the accounts of the Mess, *or as the case may be*] fraudulently convert the same [*or* pounds shillings pence part thereof] to his own use and benefit.

[1] The main provision of the Larceny Act, 1901, is—

1.—(1) Whosoever

(*a*) being entrusted, either solely or jointly with any other person, with any property, in order that he may retain in safe custody, or apply, pay, or deliver, for any purpose or to any person, the property, or any part thereof, or any proceeds thereof; or

(*b*) having, either solely or jointly with any other person, received any property for or on account of any other person,

fraudulently converts to his own use or benefit, or the use or benefit of any other person, the property, or any part thereof, or any proceeds thereof, shall be guilty of a misdemeanour, and be liable on conviction to penal servitude for a term not exceeding seven years, or to imprisonment, with or without hard labour, for a term not exceeding two years.

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While acting in the capacity of { Officer— / Clerk— / Servant— } { in the employment of— } { His Majesty the King— / the Mess of the said Ship— } { wilfully, and with intent to defraud } { destroy— / alter— / mutilate— / falsify— / making a false entry in— / concur in making a false entry in— / omit a material particular from— / concur in omitting a material particular from— / alter a material particular in— / concur in altering a material particular in— }

a { book— / paper— / writing— / valuable security— / account— } { namely (here describe the document) which— } { book— / paper— / writing— / valuable security— / account— } { belonged to— / was in the possession of— / had been received by him for or on behalf of— } { His Majesty. / the said Mess. }

NOTE.

(*w*) *This charge is framed in accordance with the provisions of the Falsification of Accounts Act*, 1875 (38 & 39 *Vict. c.* 24), *and is to be used where the offence of falsifying accounts is dealt with by court-martial.*

with intent to defraud falsely pretend to [*here insert name of person to whom the false pretence was made*] that [*here set out false pretence*] and did by means of such false pretence obtain from the sum of [*or the goods as the case may be*].

NOTE.

(*x*) *It is essential that the following matters should be alleged and proved:—*

(1) *The pretence and its falsity;*
(2) *The person to whom the false pretence was made;*
(3) *The person from whom the money or goods were obtained;*
(4) *The fact that the person parted with the money or goods in consequence of the false pretence;*
(5) *The intent to defraud.*

The expression "false pretence" means a false representation by means of words, writing or conduct that some fact or facts

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existed. A promise—though not intended to be kept as to future conduct is not a false pretence.

(4) *Forgery and False Evidence.*

feloniously forge to certain [official] documents, that is to say [*here specify documents*] the name of , with intent to defraud.

S. 67. when upon examination on oath [affirmation] before a Court-Martial for the trial of , held the day of 19 , on board H.M.S. , wilfully and corruptly give false evidence.

FORM OF CHARGE UNDER SEC. 6 & 13 N. D. ACT (SPIES, &c.).

S. 6. For that he on the day of 19 , was a spy for [the King of *or* the Republic of].

S. 13. For that he , then being on board H.M.S. , did on the day of 19 , endeavour to seduce [of that Ship] from his { duty / allegiance } to His Majesty .

II. FORM OF "LETTER FORWARDING CHARGES."

(*See* Art. 660, Adm. Inst.)

FORWARDING CHARGE FOR TRIAL.

H.M.S. " ,"
at , 19 .

SIR,

With reference to my letter, No. of , reporting the misconduct of
I have the honour to enclose the following documents with a view to his [their] trial by court-martial :—

1. Charge Sheet.
2. List of Witnesses for the Prosecution.
3. Summary of Evidence in support of Charge.
*4. Certified Extract from Conduct Book [*or* Company Conduct Sheet].
*5. Conduct Sheet with Character assessed to date of offence.
*6. Copy of Certificate of Service.

I have the honour to be, Sir,
Your most obedient Servant,
, CAPTAIN.

To
Admiral ,
COMMANDER-IN-CHIEF [SENIOR OFFICER].
&c., &c., &c.

* In case of a person below the rank of an officer.

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III. EXAMPLES OF SUMMARY OF EVIDENCE.

SUMMARY OF EVIDENCE.

In support of charge[s] against Leading Seaman Henry Jones.

Ship's Corporal 2nd Class William Smith states that on information received he went to No. 9 mess and found the accused arguing with Petty Officer Frank Robinson. He saw accused strike Robinson in the face with his fist. With the assistance of Stoker Albert James and Private William Atkins accused was removed from the mess deck and taken before the officer of the watch, by whose order he was made a close prisoner. Considers that Jones was drunk.

Petty Officer Frank Robinson states, that finding Jones in his mess when he ought to have been at work, he ordered him on deck; that Jones refused to go; that on the order being repeated Jones commenced to use threatening language to him, and after some further argument between them Jones struck him in the face with his fist. Considers that Jones was drunk.

Able Seaman Henry Jackson was in the mess and heard Robinson order Jones on deck; heard Jones refuse and use threatening language to Robinson; saw Jones strike Robinson. Does not consider that Jones was drunk, but that he was drowsy on being roused from sleep.

Stoker Albert James when passing by No. 9 mess, during an altercation between two men, whom he now identifies as Jones and Robinson, saw Jones strike Robinson. Considers that Jones was excited, but could not say that he was drunk.

NOTE.

The evidence summarized in this specimen would be sufficient, if given on oath, to substantiate charges of (1) *neglect of duty in being absent from his part of the ship during working hours.* (2) *Being drunk on board the said ship.* (3) *Using threatening language to Petty Officer Frank Robinson of the said ship, his superior officer.* (4) *Striking Petty Officer Frank Robinson of the said ship, his superior officer, being in the executionof his office.*

But No. 1 *being a very minor offence, which except for its grave sequel would not have been brought to a court-martial, would probably be discarded by the officer commanding the accused's ship, and is only utilized here as an illustration. No.* 3 *might be omitted if No.* 4 *could be clearly proved. See page* 435 *as to avoiding multiplication of charges.*

The evidence of all the witnesses whom it is proposed to call should be summarized in the above manner.

IV. FORM OF GENERAL ORDER CONVENING A COURT-MARTIAL.

COURTS-MARTIAL.

Order convening court.

[A] [Two] Court[s]-Martial [is] are to assemble on board the [the first Court] at 10.0 a.m. on day, 19 , [and the second on the conclusion of the first].

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2. The following officers are eligible to attend :—
Captain . President.
Commander
"
"
"
"
"

3. [Commander of] is to act as Prosecutor at the first Court, and [Commander of , for Detention Quarters] is to act as Prosecutor at the second Court.

V. WARRANT FOR THE ARREST OF OFFENDERS.

S.—244.

To and all others whom he may call upon to assist him in the execution of this warrant.

I being the officer in command of his Majesty's ship , do hereby authorize you, and all others aforesaid, to arrest the following men
belonging to the said ship, for , such being an offence against the Naval Discipline Act ; and you are to bring the said before me, to answer for the said offence, and to be further dealt with according to Law.

Given under my hand this day of , 19 .
Signature

VI. ORDER OF PROCEDURE AT THE TRIAL OF AN ACCUSED PERSON ON A SPECIFIC CHARGE, AND MODE OF RECORDING PROCEEDINGS.

Order of Procedure.	Mode of recording Proceedings.
1. Court assembles . Officer of Court in attendance outside.	Minutes of Proceedings at a Court-Martial held on board His Majesty's Ship at , on , the day of 191 . [and, by adjournment, every day afterwards, Sunday excepted, to the day of 19 .] Present : Captain H.M.S. President. Commodore H.M.S. (sitting as a Captain.) Captain H.M.S. Acting Captain H.M.S. (sitting as a Commander.) Commander H.M.S. H.M.S. Officiating Deputy Judge-Advocate.

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Order of Procedure.	Mode of recording Proceedings.
	The following Officers were reported as absent on leave by permission of the Convening Authority [Senior Officer present]: -
2. Officer of Court reports Witnesses in attendance.	
3. President declares the Court open.	
4. Accused brought in by Provost Marshal.	The Court having been opened, the Accused of H.M.S. was brought in, and the Prosecutor, Captain of H.M.S. ,
5. Prosecutor and audience admitted. NOTE.—*Witnesses, except when under examination, must not be present in Court (unless by permission of the Court) during any part of the Proceedings, until after the Finding.*	and the audience, admitted.
6. Accused may have a person to assist him on trial.	Lieutenant / Mr. of appeared in Court to assist the Accused.
7. Judge-Advocate reads warrant for assembling Court, and names of any Officers present at place where Court-Martial is being held junior to the President but senior to some of the Officers then assembled, absent from the Court for the reasons stated. NOTE 1.—*The warrant is in all cases to be inserted in original.* NOTE 2.—*In cases where exemption is desired on the ground of "Urgent duty," the Captain of the Ship to which*	Read, the Warrant of [the Lords Commissioners of the Admiralty, *or*, Vice-Admiral] for assembling the Court. Read, the names of Officers present at the place where the Court-Martial is being held whose attendance is not attainable by reason of the exigencies of the public service, or on account of sickness, as follows:— Captain . Urgent duty, docking H.M.S. . Captain . Urgent duty, taking H.M.S. out of harbour. Commander of H.M.S. was also reported to be absent on account of sickness.

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Order of Procedure.	Mode of recording Proceedings.
the Officer belongs will have represented the same to the Officer ordering the Court-Martial, or to the Senior Officer present, who, if he concurs in the necessity of his being allowed to be absent, will have relieved him from attending. NOTE 3.—*The names of the Officers on leave are not to be read here as they are not present at the place where the Court-Martial is being held.*	
8. Medical Officer attends to certify to the sickness of any Officer absent on that account. NOTE. — *Should the Court desire this evidence to be given on oath, it must be done after Court has been sworn, between Nos.* 17 *and* 18.	Staff Surgeon of H.M.S. was called before the Court and certified that Commander was prevented by sickness from attending the Court.
9. Judge - Advocate reads the names of Members of the Court.	Read the names of the Officers composing the Court.
10. Question of Judge-Advocate to Prosecutor: "Do you object to any of the Officers composing the Court?" NOTE.—*For form of recording objections, see Nos.* 12 *and* 13.	The Prosecutor, being asked whether he objected to any Member of the Court, stated that he had no objection, *or,* objected to (as in No. 12).
11. Should the Prosecutor object, Court is cleared, if necessary, to consider objection. Then proceed as in No. 13.	
12. Question of Judge-Advocate to Accused:	The Accused being asked whether he objected to be tried by any Mem-

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Order of Procedure.	Mode of recording Proceedings.
"Do you object to be tried by any of the Officers composing the Court?" Should the Accused object, Court is cleared, if necessary, to consider objection.	ber of the Court, stated that he had no objection, *or,* that he objected to Commander of H.M.S. on the ground that he had already inquired into the offence which formed the subject of the charge, *or,* on the ground that he had a personal interest in the result of the trial, *or,* *on any other ground which affects his competency to act as an impartial judge.* The [Court was cleared and the] objection was considered and
13. Court re-opened [if cleared]. Should objection be allowed, the Officer withdraws and the next Officer in seniority takes his place, should neither the Prosecutor nor Accused, on being asked by the Judge-Advocate, object to him. Should objection to President be allowed, Court must adjourn until new President is appointed by convening Authority.	*Should objection be allowed.* — allowed. [The Court was re-opened, and] Lieutenant of H.M.S. the Officer next in seniority, was then required to sit as a Member of the Court, in the place of Commander , the Prosecutor [Accused] having stated that he had no objection to him. *Should objection not be allowed.* — not allowed for the following reasons:— The [Court was re-opened, and the] Prosecutor [Accused] was informed that his objection was not allowed for the reasons stated.
14. Judge-Advocate informs Accused that should he have any other objection to make respecting the constitution of the Court, he can do so at this stage of the proceedings.	The Accused made no objection to the constitution of the Court, *or,* The Accused then objected to the constitution of the Court on the ground that . . .

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Order of Procedure.	Mode of recording Proceedings.
15. Should Accused object, Court cleared, if necessary, to consider objection.	*Should Prisoner object.* The [Court was cleared, and the] objection of the Accused was considered and allowed, or not allowed, &c. (as in No. 13). The Accused having no further objection to make to the constitution of the Court, the Members, &c. (as in No. 17).
16. Court re-opened, and should Accused's objection be admitted, the necessary steps are to be taken thereupon. NOTE.—*Should Accused's objection not be allowed, the reasons of the Court are to be entered on the Minutes, as at No.* 13.	
17. Oath administered to Members by Judge-Advocate, and to Judge-Advocate by President. NOTE.—*If a shorthand writer be required, he should be sworn here after the Accused has been given an opportunity of objecting to his impartiality. An interpreter should not be sworn until he is required.*	The Members of the Court and the Judge-Advocate were then duly sworn. The Accused, being asked whether he objected to as shorthand writer, stated he had no objection. was duly sworn to act as shorthand writer.
18. Judge-Advocate reads Charge[s], and the Circumstantial Letter. NOTE 1.—*The Charges and the Circumstantial Letter are to be here inserted in original.* NOTE 2.—*The Charges are not on any account to be read to Witnesses either previous to, or during, their examination in chief.*	Read, the Charge[s] and the Circumstantial Letter.

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Order of Procedure.	Mode of recording Proceedings.
19. Judge - Advocate states that Accused has been furnished, not less than 24 hours before trial, with copy of the Charge[s] and of the Circumstantial Letter, with the list of Witnesses for Prosecution, and with a notice that it is competent for him to give evidence.	The Judge-Advocate stated that the Accused had been furnished, not less than 24 hours before trial, with a copy of the Charge[s], and of the Circumstantial Letter, with the list of Witnesses for the Prosecution, and with a notice that it is competent for him to give evidence, subject to cross-examination by the Prosecutor, and examination by the Court. *or,* The Judge-Advocate stated that owing to pressing circumstances the Accused had not been furnished with a copy of the Charge[s] and of the Circumstantial Letter, with the list of Witnesses for the Prosecution, and with a notice that it is competent for him to give evidence, until *a.m.* on (*date*). The nature of the pressing circumstances was that . . .
20. Judge - Advocate informs Accused that he is not required to plead either Guilty or Not Guilty; but that should he desire to plead Guilty he should now do so, and should also lay before the Court any statement in mitigation of punishment, and call Witnesses as to general character. NOTE 1.—*Should the Accused not plead Guilty, proceedings should continue as at No.* 21. *Should he plead Guilty to one or more charges, but not in respect of the remainder, the Court will not proceed upon the plea of Guilty until after the finding on the other charges, in regard to*	

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Order of Procedure.	Mode of recording Proceedings.
which it will proceed as at No. 21. Should he plead Guilty to all charges, proceed as at No. 41. NOTE 2.—*Should the Accused's statement in mitigation of punishment appear to the Court to be inconsistent with a plea of Guilty, or should it be of such a nature as to make it evident that the charge requires investigation before justice can be done, the plea of Guilty is not to be accepted and the trial is to proceed.*	

SPECIMEN CASES IN WHICH A PLEA OF GUILTY SHOULD NOT BE ACCEPTED.

Charge.		Statement in Mitigation.
Striking . Behaving with contempt to . . Using insulting or threatening language to .	Superior Officer	Accused first struck or otherwise provoked by Superior Officer; or unaware that it was Superior Officer.
Wilful disobedience .		Accused too ill to carry out order; or not understanding order, did not disobey wilfully.
Desertion . .		Accused intended to return.
Absence without leave		Accused's near relation very ill; or prevented from returning to his leave from illness or other causes.
Theft . . .		Accused did not intend to steal the articles, but only intended to borrow them.
Acts to the prejudice of good order and naval discipline :—		
Smuggling spirits on board.		Accused brought bottle on board for someone else, not knowing contents.

And generally in every case in which the Accused pleads inarticulately.

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Order of Procedure.	Mode of recording Proceedings.
21. Witnesses for Prosecution called in order, as required, sworn, and examined. NOTE 1.—*In recording the proceedings, the rank, name, and ship of Witness, and the numbers of the questions, are to be written in the margin, in the manner shown; and rank and name of the Witness are to be shown in margin at top of every page. Pages are to be numbered consecutively.* NOTE 2.—*The first evidence required is that necessary to prove the identity of the Accused, and that he was subject to the Naval Discipline Act. The Prosecution should therefore take care that the Witness to be called on those points should be prepared, from his personal knowledge of the Accused, to testify to his identity, and, from a personal examination of the ship's books, prior to the Court-Martial, that he was duly borne thereon. The Prosecutor, or any one of the Witnesses for the Prosecution, may furnish this evidence, but it is preferable that the Witness selected should be either an Officer or a Petty Officer.* NOTE 3.—*Should the Prosecutor give evidence, he must be sworn and examined before examination of any other Witnesses to the facts; and he may be recalled for*	WHEN THE ACCUSED DOES NOT PLEAD GUILTY OR WHEN HIS PLEA IS NOT ACCEPTED. Lieut. Mr. } called, sworn, and H.M.S. Examined by the Prosecutor. 1. Are you [rank and name of Witness] of H.M.S. ? 2. Are you personally acquainted with the Accused ? and, if so, do you identify him as ? 3. Have you examined the books of H.M.S. ? 4. Did you find that on the day of last the Accused was borne on the books of that ship ? Witness withdrew (*unless he is also to give evidence as to facts*). 5. Were you doing duty as [Officer of the Watch] on the [*date of offence*] ? 6. Had you occasion to send for the Accused on that day ? If so, what was the occasion ?

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Order of Procedure.	Mode of recording Proceedings.
examination or re-examination by the Court, or for cross-examination by the Accused, during any part of the proceedings, but not for the purpose of giving evidence of any additional fact in support of the case for the Prosecution.	Lieut. / Mr. 7. What time in the day was this ?
NOTE 4.—*Every person called as a Witness, including the Accused, shall, unless otherwise ordered by the Court, give evidence from the customary place.*	8. State what occurred when the Accused came on the quarter-deck.
NOTE 5.—*Witnesses for the Prosecution may be cross-examined by the Accused; then re-examined by the Prosecutor, but only on matter arising out of the cross-examination, and finally examined by the Court and Judge-Advocate. Should the Accused decline to cross-examine, it must be so stated on the Minutes. The cross-examination of a Witness by the Accused may be postponed under the conditions stated in Article* 682, *Clause* 3, *A. I. The Court, and the Judge-Advocate with consent of the Court, may recall a Witness at any stage of proceedings; and the Court and Judge-Advocate may at any time ask questions of any Witness under examination.*	Cross-examined by the Accused [*or*, by permission of the President, by on behalf of the Accused].
	9.
	10.
	If not cross-examined / The Accused declined to cross examine this Witness.
	Re-examined by the Prosecutor.
	11.
	12.
NOTE 6.—*If an objection is made to any question, the grounds of the objection must be recorded in the Minutes, as well as*	Examined by the Court [Judge-Advocate].
	13.

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Order of Procedure.	Mode of recording Proceedings.
the decision of the Court thereon.	
In criminal proceedings, such as Courts-Martial, verbal statements made in the Accused's absence are inadmissible as a general rule. No evidence of such statements is admissible unless the Accused was present and able to hear, or himself asks about them in cross-examination, or unless thay are statements made by a person in the immediate expectation of death. (*See also p.* 349 *hereof, Article* 687a, *Clauses iii. to vii., A. I.*)	14.
	Witness withdrew.
Written or verbal statements proved to have been made in the course of a person's business or duty (e.g., *reports or entries in account books*), *or against his interest, are also admissible upon proof of the person's death and, if the statement be written, of his handwriting.*	
NOTE 7.—*If the Court should be of opinion that a Witness is prevaricating or behaving with contempt to the Court, the President must, in accordance with Article* 685, *warn him of the penalties to which he is rendering himself liable, under the provisions of section* 66 *of the Naval Discipline Act, and this warning must be recorded in the Minutes.*	The Court being of opinion that the Witness was prevaricating in his evidence [behaving with contempt] warned him that he was thereby rendering himself liable to imprisonment under section 66 of the Naval Discipline Act.
A Court-Martial is not empowered to punish a Witness for "wilfully	

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Order of Procedure.	Mode of recording Proceedings.
and corruptly giving false evidence,' which offence can only be punished after a separate trial by a Civil Court or Court-Martial under sections 45 *and* 67 *of the Naval Discipline Act; for prevarication, which is avoiding telling the truth rather than telling a lie, he can be punished under section* 66.	
NOTE 8.—*In the case of charges under section* 29 *of the Naval Discipline Act, the special evidence required by Article* 686 *must be called. For mode of recording such evidence, see No.* 21, *p.* 471.	
NOTE 9.—*Should the charge be amended under Article* 690 *of the Regulations, it is to be recorded, and verified in the original document by the President's signature.*	The Court was of opinion that there was a variance between the Charge and the Evidence adduced; and therefore directed the Judge-Advocate to amend the Charge as follows:—
No amendment can be made which has the effect of formulating a charge of a different nature to that on which the Accused was first put on his trial.	
22. Should Prosecutor not have called all the Witnesses for the Prosecution, Judge-Advocate to inform Accused that, should he desire it, the Prosecutor will call any or all of the Witnesses summoned by him but not yet called, in order that the Accused may have an opportunity of cross-examining them, subject to re-examination by the Prosecutor.	The Accused was not desirous of having called, whom the Prosecutor had summoned as a Witness, but did not examine, *or,* the Accused being desirous that the Prosecutor should call , whom he had summoned as a Witness, but did not propose to call. called and sworn and examined by the Prosecutor. 15. Are you [rank and name of witness] of H.M.S, ?

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Order of Procedure.	Mode of recording Proceedings.
If the Accused desires any such Witness to be called he should be called, sworn, and asked by the Prosecutor his rank and name, but no further question. The Accused may then cross-examine and the Prosecutor re-examine.	Cross-examined by the Accused [*or*, by permission of the President, by on behalf of the Accused].
	16. Re-examined by the Prosecutor.
	17. Examined by the Court [Judge-Advocate].
23. Prosecutor announces his case closed.	The Prosecution being closed,
24. Before the case for the Defence has been opened, the Court may call any Witness, including the Prosecutor, whose evidence may be considered necessary for the ends of justice; and such Witness may be cross-examined and re-examined, as in other cases.	the Court called before them of H.M.S. , who, having been duly sworn, was examined as follows:—
	Examined by the Court.
	18.
	19.
25. Accused informed by the Judge-Advocate that he may give evidence as a Witness on his own behalf, should he desire to do so, but that he will thereby subject himself to cross-examination.	The Accused having been informed by the Judge-Advocate that he might give evidence, but that he would thereby render himself liable to cross-examination, applied [did not apply] to give evidence.
Accused to make his application to give evidence, if he wishes to do so.	
26. The Accused, if he applies to give evidence, and is the only witness for the defence, called, sworn, and examined.	The Accused was called, sworn, and gave evidence as follows:—
	Cross-examined by the Prosecutor.
	20.
	21.
	Examined by the Court [Judge-Advocate].
	22.
	23.

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Order of Procedure.	Mode of recording Proceedings.
27. Accused called on for his defence and given time, if required, to prepare it. Court adjourned accordingly.	The Accused was then called on for his Defence, and requested an adjournment of hours to prepare it. This was granted, and the Court adjourned at p.m.
28. Court re-opened, and Accused's Defence read by himself, the person who appears to assist him, or by the Judge-Advocate. NOTE 1.—*Should Accused desire to make a verbal reply to the charges, instead of putting in a written statement, he may do so, and it must here be taken down in the Minutes in the first person, as nearly as possible in his own words.* NOTE 2.—*In case Accused calls no Witnesses, see below* (*No.* 32, *Note* 1) *as to the production of his certificates.* NOTE 3.—*The original Defence signed by the Accused is to be inserted in the proceedings here, and also copy of certificates if produced at this stage.*	The Court, having re-assembled, pursuant to adjournment, was re-opened at p.m. The Accused's Defence was read by
29. Accused, if he applies to give evidence as one of the Witnesses for the Defence, called, sworn, and examined.	The Accused was called, sworn, and gave evidence as follows :— Cross-examined by the Prosecutor. 24. 25. Examined by the Court [Judge-Advocate]. 26. 27.
30. Other Witnesses for Defence, if any, called in order, as required, sworn, and examined.	No. Sergt. R.M.L.I. H.M.S. called, sworn, and

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Order of Procedure.	Mode of recording Proceedings.
NOTE.—*After the Witnesses for the Defence have been examined, the Accused may, with the consent of the Court, deal with any discrepancies between his evidence or statement and the evidence of the Witnesses called by him, and comment on any new fact that may be elicited during the examination of his Witnesses.*	Examined by the Accused [*or*, by permission of the President, by on behalf of the Accused].
	28.
	Cross-examined by the Prosecutor.
	29.
	30.
	Re-examined by the Accused [*or*, by permission of the President, by on behalf of the Prisoner].
	31.
	32.
	Examined by the Court [Judge-Advocate].
	33.
	34.
	Witness withdrew.
31. The Court may then call any other person whom the Accused may show to be material in his behalf, or any Medical Officer whose professional opinion as to the condition of the Accused the Court may desire to have before it.	The Court called before them of H.M.S. , whose evidence the Accused showed was material, in his behalf, who, having been duly sworn, was examined by the Court.
	35.
	36.
	Witness withdrew.
	The Court called before them [Fleet] Surgeon of H.M.S. , whose professional opinion as to the condition of the Accused the Court desired to have ; who, having been duly sworn, was examined by the Court.
	36.
	37.
	Witness withdrew.
32. Defence closed. Court cleared for Finding. NOTE 1.—*No suggestion shall be made to the Accused that he should lay his certificates before the Court, but should he spontaneously express a wish to do so before the Finding, they shall be here produced, read, and verified, and a copy inserted in the Minutes.*	The Accused, having nothing further to offer in his defence [laid his Certificates before the Court, and] the Court was cleared at p.m. to consider the Finding.

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Order of Procedure.	Mode of recording Proceedings.
Otherwise they are to be read after a Finding of "Guilty." (*See No.* 36.) NOTE 2.—*The Judge-Advocate, if so directed by the Court, draws up such questions as may be agreed upon whereon to form a determination with regard to the innocence or guilt of the Accused.* NOTE 3.—*Judge-Advocate collects votes, beginning with Junior Member, and so on up to President. Votes are not to be given in writing, but orally. Votes of majority decide. When, on a division, votes are equal, construction most favourable to Accused to prevail.* NOTE 4.—*The Finding, when drawn up by the Judge-Advocate, is to be signed by all the Members of the Court and by himself.* NOTE 5.—*If the Accused's antecedents were not gone into at No.* 28 *or No.* 32, *the finding that the charge is not proved renders their consideration unnecessary.*	FINDING. The Court finds that the charge [amended charge] against the Accused is not proved, and therefore acquits him of the same. *or* that the charge of negligently or by default, losing, stranding, or hazarding H.M.S. is not proved in that the said loss [stranding or hazarding] was due to an error of judgment of the Accused not amounting to an offence under the Naval Discipline Act, and therefore acquits him of the said charge. *or* The Court finds that the charges [amended charges] against the Accused are proved. *or* that the first charge against the Accused is proved, but that the second charge is not proved, and therefore acquits him of the second charge. *or* that the charges against the Accused are proved, with the

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Order of Procedure.	Mode of recording Proceedings.
	exception of so much of the first charge as relates to . *or* that the charge against the Accused is partly proved, inasmuch as he struck his Superior Officer, but not with a weapon. *or* that the charge of desertion against the Accused is not proved, but that he improperly left his ship. *or* that the charge of theft against the Accused is not proved, but that he [attempted to steal, *or* embezzled, *or* wrongfully appropriated . . . *as the case may be*]. *or* the Accused having pleaded guilty to the first charge, the Court considers that charge proved, and also finds that the second and third charges against the Accused are proved. *A.B.* *C.D.* *E.F.* *G.H.* *I.J.* *K.L.*, Officiating Deputy Judge-Advocate. (*Date*) .
33. Court re-opened, and Judge-Advocate reads Finding. 34. President declares Court to be dissolved, and waits on Commander-in-Chief, or Senior Officer present, as soon as possible, with a letter reporting Finding.	If found Not Guilty. The Court was re-opened at p.m. ; the Accused brought in ; the Prosecutor, Witnesses, and Audience admitted ; the Finding read ; and the Accused acquitted accordingly. The President declared the Court dissolved. *K.L.*, Officiating Deputy Judge-Advocate. (*Date*) .

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Order of Procedure.	Mode of recording Proceedings.
	IF FOUND GUILTY.
35. Court re-opened. The Judge - Advocate reads the Finding.	The Court was re-opened at p.m. ; the Accused brought in ; the Prosecutor, Witnesses and Audience admitted, and the Finding read.
36. If not already read as provided at No. 32, Judge - Advocate reads Accused's certificates, verifying all copies for insertion in Minutes. NOTE 1.—*Should no entries appear in the Conduct Book [Company Conduct Sheet in the case of a Marine], it must be so stated in the Minutes.* NOTE 2.—*In the event of the Accused having been previously tried by Court - Martial, the Judge-Advocate is to produce the list of officers tried by Court-Martial or certified extract therefrom and read to the Court the entry relating to the Accused.* NOTE 3.—*In case of an Officer, Judge-Advocate to ask Prosecutor if he produces any entry against Accused in ship's log, or other official document containing a definite censure for a definite offence previous to that before the Court.* NOTE 4.—*Copies of all the above documents are to be here inserted in the proceedings as enclosures or entries, if not already inserted as provided at No. 32.*	The Accused's certificates [conduct sheet, and the entries under his name in the Conduct Book (Company Conduct Sheet *in the case of a Marine*)] were read and the copies verified. *In the case of an Officer.* — The following entry against the Accused in the Ship's Log was read :— The following entry in the Return of Naval Courts - Martial was [also] read :— The following document [*of the nature of a definite censure by a superior authority for a definite offence*] was also read (*or if no such entries or documents, it should be here so stated*).
37. Accused asked	The Accused being asked whether

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Order of Procedure.	Mode of recording Proceedings.
whether he wished to call evidence as to character.	he wished to call evidence to character, replied that he did [not].
	or called, sworn, and examined by the Accused [*or*, by permission of the President, by on behalf of the Accused].
	cross-examined by Prosecutor, 35.
	re-examined by the Accused, 36.
	examined by the Court. 37.
38. Court cleared for framing Sentence.	The Court was then cleared and proceeded to frame the Sentence.
NOTE 1.—*Judge-Advocate collects votes, beginning with Junior Member, and so on up to President. Votes are not to be given in writing but orally. Votes of majority decide, except for judgment of death. When, on a division, votes are equal, construction most favourable to Accused to prevail (see also Article* 695, *p.* 90). *The Sentence, when drawn up by Judge-Advocate, is to be signed by all Members of the Court and by himself.*	Sentence.
NOTE 2.—*Should the Court wish to draw attention to the conduct, or manner of giving evidence, of any Witness, a notation to that effect should be made on the Minutes after the Sentence, of which, however, it is not to form any part, unless Sentence is passed upon him under section* 66 *of N. D. Act.*	The Court having found that the charge[s] against the Accused { is / are } proved [*or as at No.* 32 *under* "*Finding*"] [and having taken into consideration his previous good (bad) character as shown by], *or* [and also having taken into consideration his previous convictions by Court-Martial], adjudges him, the said [for forms of Sentence, *see p.* 480].
NOTE 3.—*Except in the one case mentioned below, the date of the commencement of a Sentence*	*If a Witness is sentenced.* { [and it appearing to the Court that of H.M.S. who was called as a Witness, did (prevaricate in his evidence) *or* (behave with contempt to the Court), the Court adjudges him, the said , to be imprisoned (or kept in detention) in one of His Majesty's prisons for a term of].

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Order of Procedure.	Mode of recording Proceedings.
of penal servitude, or imprisonment, or detention is not to be stated therein, as by virtue of section 74 (1) of the N. D. Act, a term of penal servitude, imprisonment, or detention commences on the date on which the Sentence is passed, unless the Person sentenced is at the time undergoing a previous Court-Martial sentence, when under section 73, N. D. Act, it may be made to commence from the expiration of such previous sentence provided the total period of two years is not exceeded. NOTE 4.—*When a Sentence of imprisonment or detention is passed in months the term "Calendar Month" is to be used.* NOTE 5.—*Sentences of imprisonment are not to direct that the Prisoner is to be kept in solitary confinement.* NOTE 6.—*In framing a sentence of imprisonment or detention, the minor penalties which are the necessary consequence of such sentence, as laid down in section 53 (10), N. D. Act, and in Article 757 of the King's Regulations and Admiralty Instructions, need not be stated.*	Signatures of the Court { *A.B.* / *C.D.* / *E.F.* / *G.H.* / *I.J.* *K.L.*, Officiating Deputy Judge-Advocate. (*Date*) *If a Witness is censured.* { The Court desired to record their sense of the unsatisfactory manner in which of H.M.S. gave his evidence.
39. Court re-opened, and Judge-Advocate reads Sentence.	The Court was re-opened; the Accused brought in; the Prosecutor, Witnesses, and Audience admitted; and Sentence pronounced accordingly. [The above Sentence

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Order of Procedure.	Mode of recording Proceedings.
	[Censure] on a Witness was also read.]
40. President declares Court to be dissolved; and waits on Commander-in-Chief, or Senior Officer present, as soon as possible, with a letter reporting Finding and Sentence.	The President directed the Accused [and the Witness sentenced as above] to be removed, and declared the Court dissolved. *K.L.*, Officiating Deputy Judge-Advocate. (*Date*) .
	WHEN THE ACCUSED PLEADS GUILTY TO ALL THE CHARGES.
41. Judge-Advocate asks Accused whether he wishes to make any statement in reference to the charge[s] to which he has pleaded Guilty. NOTE 1.—*If the Accused makes a statement in mitigation of punishment, it must here be taken down in the Minutes in the first person, as nearly as possible in his own words.* NOTE 2.—*The written statement, if any, signed by the Accused, is to be here inserted in the proceedings; it may be read by himself, the person who appears to assist him, or by the Judge-Advocate.*	The Accused here pleaded Guilty to the charge[s], and stated that he did so voluntarily. The Accused [declined to make any statement in reference to the charge[s]] *or* [handed in the annexed statement, which was read to the Court by], *or* [made the following verbal statement].
42. Should the Court, or Judge-Advocate consider that the plea of Guilty should not be accepted, the trial is to proceed as at No. 21.	The Court being of opinion [that the Accused's statement was not consistent with a plea of Guilty] *or* [that the Accused did not understand the effect of his plea of Guilty] *or* [that the case required investigation before justice could be done] directed that the plea of Guilty should not be accepted, and that the trial should proceed as if the Accused had not pleaded Guilty.

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Order of Procedure.	Mode of recording Proceedings.
43. Accused's Witnesses as to general character examined. NOTE.—*These Witnesses may be examined, cross-examined, and re-examined, as at No.* 30.	Lieutenant H.M.S. 1. 2. } called, sworn, and Examined by the Accused. Witness withdrew.
44. Judge-Advocate reads Accused's certificates, as at No. 36 and Notes to 36. NOTE.—*The copies of these certificates, &c., are to be here inserted in the proceedings.*	The Accused having nothing further to offer in mitigation of punishment his Certificates *If an officer* [were at his request read to the Court by the Judge-Advocate] *If a man* [were produced by the Prosecutor and read to the Court by the Judge-Advocate] and
45. The Court cleared for framing Sentence, as at No. 38.	The Court was then cleared and proceeded to frame the Sentence. Sentence. The Accused having pleaded Guilty, the Court considers the charge[s] proved, and therefore adjudges him, the said , to be (*See forms of sentence at* p. 480.) *A.B.* *C.D.* *E.F.* *G.H.* *I.J.* *K.L.*, Officiating Deputy Judge-Advocate. (*Date*) .
46. Subsequent proceedings as at Nos. 39 and 40.	

NOTE.—*Except as provided for at No.* 38, *any representations which the Court may desire to make with reference to matters arising out of the Court-Martial must be made the subject of a separate letter, signed by the President before the Court is dissolved; they are not to form part of the Recorded Proceedings of the Court* [*vide* Article 695 (3), *Adm. Inst*].

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VII. ORDER OF PROCEDURE AND MODE OF RECORDING PROCEEDINGS OF A COURT-MARTIAL HELD UNDER SECTIONS 91 AND 92, NAVAL DISCIPLINE ACT.

Order of Procedure.	Mode of recording Proceedings.
1. Court assembles. Proceed as at 2 and 3 at trial of an Accused Person on specific charge (*p.* 450).	*Proceedings to be recorded as opposite* 1 *and* 2 *and* 3.
4. Accused brought in, and audience admitted. NOTE.—*The list of the (surviving) officers and crew is to be attached to the Minutes.* Proceed as at 6 to 17 inclusive at trial of an Accused Person on specific charge.	The Court having been opened, the Captain [and *or* surviving], officers, and crew of H.M.S. brought in, and names called over, and audience admitted. *Proceedings to be recorded as opposite* 6 *to* 17 *inclusive.*
18. Judge-Advocate reads narrative, if any, of Captain, or senior surviving officer, of the wreck, loss, destruction, or capture of ship.	Read the Captain's [senior surviving officer's] narrative of the wreck [loss, destruction, or capture] of ship.
19. Captain, or senior surviving officer, called, sworn, cautioned and examined by the Court.	Captain / H.M.S. Called, sworn, cautioned, and examined by the Court. 1. Is the narrative just read to the Court a true statement of the circumstances of the wreck [loss, destruction, or capture] of H.M.S. ? 2. Have you any complaint to make against any of the surviving officers and crew of H.M.S. on that occasion ?
20. Question by the Court to the remaining Officers and Ship's Company generally.	3. Have you or any of you anything to object to in the narrative just read to the Court or anything to lay to the charge of any officer or man with reference to their conduct

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Order of Procedure.	Mode of recording Proceedings.
	on the occasion of the wreck [loss, destruction, or capture] of H.M.S. ?
21. In case of loss of a ship, Court directs one or more competent Navigating Officers to perform the duties laid down in Article 686 (*c*) of King's Regulations and Admiralty Instructions.	The Court here called before it Commander (N) of H.M.S. , and Lieutenant (N) of H.M.S. , and, after handing to them the log, the Navigating Officer's notebook and workbook, and the fair and rough engine-room registers, directed them to work up the Ship's reckoning from the time when her position was last accurately ascertained (*or as the case may be*) to the time of her loss or grounding and to deliver the result to the Court attested by their signatures.
22. Proceed with examination of the Captain and any of the surviving Officers or men. NOTE.—*Any Witness called by the Court may be cross-examined by any Officer or member of the crew of the Ship, whose wreck, loss, destruction, or capture is under investigation, against whom any allegation has been made either expressly or by implication.*	Captain further examined by the Court. 4. 5. Cross-examined by . 6. 7.
23. Proceed with the examination of Witnesses as requisite.	Commander . H.M.S. . 8. Are you ? 9. 10. Cross-examined by . 11. Re-examined by Court. 12.
24. As soon as the Navigating Officers mentioned at 21 have worked	Commander (N) H.M.S. called, sworn, and examined by the Court.

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Order of Procedure.	Mode of recording Proceedings.
out the reckoning they are to be recalled. Their examination is to be limited to ascertaining the accuracy or inaccuracy of the document produced.	13. Have you in obedience to the Orders of the Court worked up the reckoning of H.M.S. from the time when her position was last accurately ascertained (*or, from such time as the Court required*)? 14. Does the course laid down, and the position of the ship on the chart you produce, accurately represent the result of your work? Cross-examined by 15. Re-examined by the Court. 16.
25. Proceed as in any ordinary trial. NOTE.—*If the Court is of opinion that there is no blame attributable to any-one, the Finding should be in the form of a short narrative of the circumstances of the wreck (loss, destruction,* or *capture) of the Ship.*	Lieutenant called, sworn, H.M.S. and examined by the Court. Examined as above, Question 13, &c.

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APPENDIX II.

List of Forms.

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FORMS.

No. 1.

Form of warrant ordering a court-martial

By , Admiral and Commander-in-Chief of His Majesty's Ships and Vessels employed, and to be employed, on the station.

Whereas , of His Majesty's Ship , has

where there is a specific charge;

transmitted to me a letter, dated the day of 19 , reporting the misconduct of of the said ship; and whereas I think fit that the said shall be tried by court-martial, I send you herewith the said letter, and do, in exercise of the powers conferred on me by commission from the Admiralty [from Admiral and Commander-in-Chief of], hereby direct you to assemble a court-martial on board His Majesty's Ship , on the day of 19 , or as soon afterwards as circumstances will admit, which Court, you being President thereof, is hereby ordered to try the said on the accompanying charges accordingly.

Given under my hand on board His Majesty's Ship , at , the day of 19 .

Signature .

To ,

.

No. 2.

where there is no specific charge.

By , Admiral and Commander-in-Chief of His Majesty's Ships and Vessels employed, and to be employed, on the station.

Whereas I think fit that a court-martial shall be held to enquire into the cause of the [wreck, loss, destruction, *or* capture, *as the case may be*] of His Majesty's Ship , I do, in exercise of the powers conferred on me by commission from the Admiralty [from Admiral and Commander-in-Chief of], direct you to assemble a court-martial on board His Majesty's Ship on the day of 19 , or as soon afterwards as circumstances will admit, which Court, you being President thereof, is hereby ordered to enquire into the cause of the said [wreck, loss, destruction, *or* capture *as the case may be*], and to try and all the [surviving] officers and crew of His Majesty's Ship .

Given under my hand on board His Majesty's Ship , at , the day of 19 .

Signature .

To ,

.

No. 3.

Form of warrant appointing a Judge-Advocate by convening authority.

By , Admiral and Commander-in-Chief of His Majesty's Ships and Vessels employed, and to be employed, on the station.

Whereas I have ordered a court-martial to be assembled on board His Majesty's Ship , on the day of 19 , for the trial of , of His Majesty's Ship , I do

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hereby appoint you to officiate as deputy judge-advocate on the occasion.

Given under may hand, on board His Majesty's Ship , at , the day of 19 .

Signature .

The following documents accompany this Warrant.

[*See Article* 664 *on* p. 47.]

To ,

.

No. 4.

By .

Warrant by President appointing Judge-Advocate.

Whereas by warrant of the Lords Commissioners of the Admiralty [, Admiral and Commander-in-Chief, &c.], dated day of , I have been appointed President of a court-martial to be assembled on board His Majesty's Ship on the day of 19 , for the trial of , of His Majesty's Ship . And whereas the said has not appointed any person to officiate as deputy judge-advocate I do hereby appoint you to officiate as deputy judge-advocate on the occasion.

Given under my hand, &c.

Signature .

The following documents accompany this Warrant.

(*The accompanying papers are the same as with Form* 3.)

To .

of His Majesty's Ship .

No. 5.

Warrant appointing Provost Marshal.

By , Admiral and Commander-in-Chief of His Majesty's Ships and Vessels employed, and to be employed, on the station [Senior Officer of H.M. Ships at].

Whereas a court-martial has been ordered to assemble on board His Majesty's Ship on the day of 19 , for the trial of , of His Majesty's Ship , I do hereby appoint you to officiate as provost-marshal on the occasion; and you are forthwith to take the said into your custody, and safely keep him until he shall be delivered in due course of law.

Given under my hand, &c.

Signature .

To ,

Master-at-Arms,

H.M. Ship .

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No. 6.

His Majesty's Ship , 19 .

Memorandum to Officer of Court.

1. The officer of the court is to muster the witnesses outside, and, as soon as the court is formed, is to report to the president that they are in attendance.

2. On the order being given to open the court, he is to acquaint the prosecutor and cause the Accused to be brought in.

3. Witnesses are not to be allowed in court until called to give evidence, except by permission of the court.

4. Witnesses are to leave the court as soon as they have been examined, and are not to be allowed to communicate with those who have not been examined.

5. No witness is to be allowed to leave the ship without the permission of the president of the court.

6. The witnesses are to assemble in court to hear the finding read and sentence pronounced.

7. When the court is cleared to deliberate, no one is to be allowed in the vicinity.

Signature ,
President of the Court.

To the Officer of the Court.

(*For the list of witnesses, see other side.*)

No. 7.

H.M.S. , 19 .

Notice from Judge-Advocate to Prosecutor.

Sir,

I beg leave to inform you that has ordered Captain of His Majesty's Ship , to assemble a court-martial at a.m., on next, the , on board His Majesty's Ship , to try , of His Majesty's Ship , [on the charge preferred against him by you on the] *or if the charge has been amended by convening Authority* [on the accompanying charge[s]].

If an Officer.

[It is requested that certified copies of any entries against the officer in the log, and of any other documents of the nature of definite censure by superior authority for a definite offence, may be forwarded to me, and that the ship's log and the original documents may be produced in court.]

If a Man.

[Be good enough to communicate to me the name of the officer, if any, detailed to assist the Accused.

It is requested that the conduct book (company conduct sheet *if a Marine*), and the accused's certificate of service, may be produced in court.]

I have the honour to be,
Sir,
Your obedient servant,
Signature ,
Officiating Deputy Judge-Advocate.

To ,
His Majesty's Ship .

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No. 8.

H.M.S. ,
At ,
19 .

Notice of trial to Accused.

Orders having been given for a court-martial for your trial to be assembled on board His Majesty's Ship , at a.m., on the day of 19 , or as soon afterwards as circumstances will permit, I transmit to you herewith, for your information, a copy of the charge[s], together with a list of the witnesses for the prosecution, and a copy of the circumstantial letter reporting the facts on which the charges are founded and showing the real nature and extent of the offence[s] with which you are charged. If you plead guilty you will be considered to have admitted the accuracy of all the material statements contained in the circumstantial letter.

You are entitled, but are not obliged, to give evidence on your own behalf. If you do give evidence you will be liable to be cross-examined by the prosecutor and examined by the Court.

If you will furnish me in writing with the full names and addresses of any witnesses whom you may desire to call, including witnesses as to character, they shall be duly summoned to attend on your behalf.

It is requested that you will inform me of the name of any person whom you may have asked to assist you at the trial.

Under the King's Regulations you are entitled, if you ask for it, to my opinion on any question of law relating to the charge[s] or trial.

If an Officer.

[If you wish to lay any certificates before the court they should be abstracted, and the original certificates and the abstract handed to me in court.]

Signature ,
Officiating Deputy Judge-Advocate.

To .

No. 9.

H.M.S. ,
At ,
19 .

Sir,

Notice by Judge-Advocate to President that he has sent neces-

I have the honour to inform you that I have, in obedience to the directions contained in Article 669 of the King's Regulations and Admiralty Instructions furnished , for whose trial a court-martial has been directed to assemble on next, with a copy of the charge[s] and of the circumstantial letter, and with a list of the witnesses whom the Prosecutor proposes to call. I have also informed him that he is entitled

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sary documents to Accused.

to give evidence on his own behalf, and that any witnesses he may desire to call shall be summoned.

I have the honour to be,
Sir,
Your obedient servant,
Signature ,
Officiating Deputy Judge-Advocate.

To ,
His Majesty's Ship ,
President of the Court-martial.

No. 10 (*a*).

Form of summons to witness not subject to N. D. A.

Whereas a court-martial has been ordered to assemble on board His Majesty's Ship at , on the day of 19 , for the trial of of His Majesty's Ship , on a charge of and whereas it has been stated to me that your evidence will be material [and that you have in your possession and control certain documents which are also material for the trial and determination of the matter to be brought before the court] I do hereby, by virtue of the power given to me by the Naval Discipline Act, summon and require you to attend at the sitting of the said court on the day of 19 , at o'clock a.m. [and to bring with you the documents hereinafter mentioned, namely] and so to attend from day to day until you shall be duly discharged; and you are hereby required to obey this summons on pain of the penalties declared by the said Act.

Given under my hand on board His Majesty's Ship at , this day of 19 .
Signature ,
Officiating Deputy Judge-Advocate.

No. 10 (*b*).

Summons to witnesses subject to N. D. A.

To { } of H.M.S. .

A court-martial having been summoned to assemble on board His Majesty's Ship at a.m., on the day of 19 , for the trial of of H.M.S. you and each of you are hereby required to attend at the sitting of the Court on the day and at the time above mentioned.

It is requested that this document may be initialled by each witness and returned to me.

Given under my hand on board His Majesty's Ship at , this day of 19 .
Signature ,
Officiating Deputy Judge-Advocate.

NOTE.—*The names of any number of Witnesses belonging to the same ship may be included in a summons in the above form.*

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No. 11.

at ,
19 .

Memorandum.

As I am satisfied that urgent duty [*here state the nature of the duty*] demands the services of yourself [of , of His Majesty's Ship under your command], on the forenoon of the when a court-martial is ordered to assemble for the trial of of His Majesty's Ship , at which court-martial { your / the } seniority [of the said] renders { you / him } liable to sit as a member, I have informed the President that owing to the exigencies of the public service { your / his } attendance at the Court is not attainable (*see* section 58, clause 16, Naval Discipline Act). Absence of Members.

Signature ,
Commander-in-Chief *or* Senior Officer.

To ,
His Majesty's Ship .

No. 12.

at 19 . List of Officers next in Seniority to , President of the Court-Martial ordered to be held this day for the Trial of , of His Majesty's Ship .

Ship.	Name.	Rank.	Seniority.	If by reason of the exigencies of the public service, the attendance of any officer is not attainable, a notation to that effect is to be made against his name, and the nature of the urgent duty stated. Any officers on leave should be so noted.

Signature ,
Commander-in-Chief [Senior Officer].

To ,
President of the Court-Martial.

NOTE.—*This list should contain sufficient names to provide two spare officers; the names of officers who would be eligible to sit as members but for their absence on leave are to be included.*

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Specimen Forms of Sentence.

No. 13.

Death by shooting.

to be shot to death at such time and on board such ship as the Commissioners for Executing the Office of Lord High Admiral of the United Kingdom of Great Britain and Ireland [, Admiral and Commander-in-Chief of His Majesty's Ships employed, and to be employed, on the station] shall direct.

No. 14.

Death by hanging.

to be hanged by the neck till he be dead on board such one of His Majesty's Ships and at such time as the Commissioners for Executing the Office of Lord High Admiral of the United Kingdom of Great Britain and Ireland [Admiral and Commander-in-Chief of His Majesty's Ships employed, and to be employed, on the station] shall direct.

No. 15.

Corporal punishment.

to receive lashes according to the custom of the Navy.

No. 16.

Penal servitude.

to be kept in penal servitude for the term of years.

No. 17.

Imprisonment; and dismissal from His Majesty's Service.

to be imprisoned [and kept to hard labour] for the term of [and at the expiration of the said term to be dismissed (with disgrace) from His Majesty's Service].

No 17 (*a*).

Detention.

to be kept in detention for the term of .

No. 18.

Forfeiture of seniority; dismissal from ship; and reprimand.

to forfeit seniority [as a Lieutenant in His Majesty's Fleet]; to be dismissed from H.M.S. and to be (severely) reprimanded.

NOTE.—*Form of sentence on Witness for prevarication or contempt is given on p.* 467.

Specimen Forms of Warrants, &c.

No. 19.[1]

Warrant for carrying out sentence of death.

By , Admiral and Commander-in-Chief of His Majesty's Ships and Vessels employed, and to be employed, on the Station.

Whereas at a court-martial held on board His Majesty's

[1] This Form is for use on Foreign Stations only.

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Ship at on the instant, sentence of death was passed upon of His Majesty's Ship , in the words following:—

(*Here insert copy of the sentence.*)

And whereas I have thought fit to approve the same;

You are hereby required and directed to see the said sentence carried into execution on next, the instant, or as soon afterwards as conveniently may be (Sunday excepted), between the hours of eight and eleven o'clock in the forenoon, by causing the said to be shot to death [hanged by the neck till he be dead] at some convenient place on board His Majesty's Ship , under your command; and for so doing this shall be your warrant.

Given under my hand, on board His Majesty's Ship , at , the day of 19 .

Signature .

To ,
His Majesty's Ship .

No. 20.

Certificate for penal servitude.

This is to certify that , of His Majesty's Ship , who is sent herewith to His Majesty's Ship [to His Majesty's Prison at], there to remain in safe custody until removed therefrom by due authority, was on the day of 19 , tried by a court-martial held on board His Majesty's Ship , on a charge of , and sentenced to be kept in penal servitude for the term of years.

Dated on board His Majesty's Ship , at , the day of 19 .

Signature ,
Admiral and Commander-in-Chief on the station.

To the Governor or Keeper of
His Majesty's Prison
at ,
or
To ,
Officer Commanding His Majesty's Ship .

No. 21.

Warrant for imprisonment or detention.

By Admiral and Commander-in-Chief of His Majesty's Ships and Vessels employed, and to be employed, on the Station.

Whereas at a court-martial held on board His Majesty's Ship at , on the day of 19 , of His Majesty's Ship , was tried for , and sentenced to be [imprisoned, etc.] [or, kept in detention, etc.].

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[1][And whereas I deem it expedient that the said shall be sent to His Majesty's[2] at , and that on arrival there he shall undergo his sentence subject to the deduction of any time during which he has been kept in confinement in respect of the said sentence.]

You are hereby required and directed to receive and keep in your custody the said to be dealt with in accordance with the said sentence, until he shall be delivered in due course of law.

Dated on board His Majesty's Ship , at , the day of 19 .

Signature .

The following is to be filled up by the Commanding Officer of vessel bringing the offender to the place of confinement, where the powers conferred by section 74 (2) *of the Naval Discipline Act have been made use of. It is not applicable to the case of an offender who is being transferred from one place of confinement to another:—*

I hereby certify that the said has been kept in confinement on days in respect of his sentence.

Signature ,
Captain of His Majesty's Ship .

To the Officer in Charge of
His Majesty's[2]
at .

[1] This paragraph is only to be used when it is considered desirable under s. 74 (2) N. D. Act, to delay the execution of a sentence in consequence of the court-martial being held at a place where there is no proper place to which the offender can be sent, either temporarily or otherwise. (*See* Article 696a (iii). For the meaning of "confinement," *see* Article 760 of the King's Regulations, and Note to Article 696a (iv.) on p. 258.)

[2] Prison, Naval Detention Quarters, or Military Detention Barracks. But a person sentenced to detention may not be confined in a prison.

No. 22.

Warrant for transfer of prisoners or person under detention.

By , Admiral and Commander-in-Chief of His Majesty's Ships and Vessels employed, and to be employed, on the Station.

Whereas at a court-martial held on board His Majesty's Ship at , on the day of 19 , , of His Majesty's Ship was tried for , and sentenced to be :

And whereas I deem it expedient that the said , who is now confined under the said sentence in the at shall be removed to ;

I do hereby require and direct you to deliver over the said to Naval custody, for the purpose of his being removed

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to to be there kept in custody and dealt with in accordance with the said sentence.

Dated on board His Majesty's Ship , at , this day of 19 .

Signature .

To the Officer in Charge of
His Majesty's
at .

NOTES.

(*a*) *The warrant must be forwarded to the Admiralty when an offender is sent to England, in order that a copy of it may be made, and attested by the Secretary of the Admiralty, as the authority for the officer in charge of the second place of confinement to receive the offender.*

(*b*) *The provisions of section 75 of the N. D. Act are such that it is not competent for a Commander-in-Chief or Commanding Officer to transfer an offender from one place of confinement to another on the Station, unless before doing so he can obtain a copy of the removal warrant attested by the Secretary to the Admiralty as the authority to the officer in charge of the second place of confinement to detain the offender.*

No. 23.

Warrant for discharge or removal of prisoners or person under detention.

By , Admiral and Commander-in-Chief of His Majesty's Ships and Vessels employed, and to be employed, on the Station.

By virtue of the power and authority vested in me by the Naval Discipline Act, I do hereby require and direct you to discharge [to deliver over to Naval custody, for the purpose of giving evidence at a court-martial to be held on board His Majesty's Ship on the instant] of His Majesty's Ship now in your custody under sentence of a court-martial dated the day of 19 .

Dated on board His Majesty's Ship , at , the day of 19 .

Signature .

To the Officer in Charge of
His Majesty's
at .

NOTE.—*In the case of summary or detention imprisonment the order of the Commanding Officer who sentenced him is sufficient.*

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No. 24.

The following transcript of my Shorthand Notes has been made by me, and is accurate.

Signature .
Shorthand Writer.

This is to certify that the following pages of typewritten evidence are transcribed from the shorthand writer's notes of the evidence taken at the court-martial, and that the transcription was made under my supervision.

Signature ,
Officiating Deputy Judge-Advocate.

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